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NO. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

THE KIOWA TRIBE OF OKLAHOMA
a federally recognized Indian Tribe,
Petitioner,

v.

AIRCRAFT EQUIPMENT COMPANY
an Oklahoma Partnership, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the Oklahoma Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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July, 1997

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15 pp

QUESTIONS PRESENTED

Whether seizure of a federally recognized Indian tribe's tribal tax revenue by use of state court post-judgment remedies: (a) violates the tribe's sovereign immunity, or (b) infringes upon the tribe's right to self-government and Congress' goal of tribal self-determination?

Whether a state court injunction that prohibits a federally recognized Indian tribe from enforcing its tribal tax laws on Indian Country under the tribe's jurisdiction: (a) violates the tribe's sovereign immunity, or (b) infringes upon the tribe's right to self-government and Congress' goal of tribal self-determination?

LIST OF PARTIES

The Petitioner, The Kiowa Tribe of Oklahoma, is a federally recognized Indian Tribe. Petitioner was Defendant/Appellant below.

The Respondent, Aircraft Equipment Company, is an Oklahoma partnership. It was Plaintiff/Appellee below.

The following Respondents are corporations subject to Petitioner's oil and gas severance tax. These Respondents were Defendant/Appellees below:

Associated Transport and Trading Co., a corporation
Associated Natural Gas, Inc., a corporation
Aquila Energy Corporation, a corporation
Hamon Operating Company, a corporation
Home-Stake Royalty Corporation, a corporation
Kerr-McGee Corporation, a corporation
ORYX Energy Corporation, a corporation
Plains Liquids Transport, Inc., a corporation
Senex Pipeline Company, a corporation
Sun Company, Inc., a corporation
Total Petroleum, Inc., a corporation

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OPINION BELOW

The opinion of the Oklahoma Supreme Court is reported at 68 Okla. Bar Jour. 1649 (May 10, 1997). It is styled *Aircraft Equipment Company v. The Kiowa Tribe of Oklahoma, et al.*, No. 86,184, Supreme Court of Oklahoma. The text of the opinion is reproduced in the Appendix, p.1.

JURISDICTION

The opinion of the Oklahoma Supreme Court was entered May 6, 1997. This Court's jurisdiction to consider this petition from the final judgment or decree by the highest court of the state in which the decision could be had is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTION PROVISIONS

Article I, Section 8, Clause 3 of the United States Constitution:

> "The Congress shall have Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

Article VI, Clause 2, of the United States Constitution:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . ."

STATEMENT OF THE CASE

Preliminary Statement

This case challenges state court seizure of the Kiowa Tribe of Oklahoma's ("Kiowa" or the "Tribe") tribal tax revenue. It also challenges an injunction in aid of execution which prohibits Kiowa from enforcing Kiowa law upon Kiowa Indian Country.[1] The seizure of taxes is in satisfaction of a state court damage judgment against Kiowa.

This Court has granted certiorari to review the granting of a state court judgment against Kiowa. *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, No. 96-1037, United States Supreme Court. The tax revenue seizure challenged in this case is being done in satisfaction of a judgment that arises from similar facts as are involved in the *Manufacturing Technologies* case. Thus, this case is related to the *Manufacturing Technologies* case because it raises issues of enforcement of a judgment which is

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[1] Indian Country is defined at 18 U.S.C. § 1151.

essentially similar to the judgment being reviewed in *Manufacturing Technologies*.

Background Facts

Kiowa is a federally recognized Indian tribe. Under federal law, Kiowa has sovereign immunity to suit unless Congress authorizes suit against it or Kiowa expressly waives its immunity. *United States v. United States Fidelity & Guaranty*, 309 U.S. 506, 60 S.Ct. 654, 84 L. Ed. 894 (1940)

In an earlier suit, the Respondent in this case, Aircraft Equipment Company, ("Aircraft Equipment"), recovered a state court damage judgment against Kiowa. Kiowa asserted that this damage judgment was void, because neither Kiowa nor Congress authorized the suit. *See Aircraft Equipment Company v. The Kiowa Tribe of Oklahoma*, 921 P. 2d 359 (Okla. 1996) ("*Aircraft Equipment I*")[2]. The

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[2] As consideration for the purchase of a part of the shares of Clinton-Sherman Aviation, Inc., an Oklahoma business corporation, Kiowa assumed Aircraft Equipment's obligation upon an existing promissory note. Kiowa defaulted by failing to make scheduled payments. There was no waiver of sovereign immunity in the assumption agreement. Rather, Kiowa expressly reserved all of its "sovereign rights." Using a series of promissory notes as consideration, Kiowa purchased from Aircraft Equipment and other entities all shares of Clinton-Sherman Aviation, Inc. Each note specifically reserved Kiowa's sovereign rights. Defaults on these notes resulted in a series of suits against Kiowa. See *Hoover v. Kiowa Tribe of Oklahoma*, 909 P. 2d 59 (Okla. 1995) *cert. denied* ____ U.S. ____, 116 S.Ct. 1675, 134 L. Ed. 2d 799 (1996); *Aircraft Equipment I*, 921 P.2d at 363; *JBJ* (continued...)

Oklahoma Supreme Court ignored the requirement of a congressional consent to suit or a tribal waiver of immunity because it held that it has "inherent jurisdiction" over an Indian tribe that engages in commerce outside of Indian County, unless Congress ousts that jurisdiction.[3]

This particular petition for certiorari challenges Aircraft Equipment's second state court suit against Kiowa to enforce its earlier damage judgment. This second suit asked for: (1) a creditor's bill judgment to seize Kiowa's tribal tax revenues and (2) an injunction to stop Kiowa from enforcing its own tax laws on Indian Country subject to Kiowa's jurisdiction.

The targeted tax revenue is all of the oil and gas severance taxes imposed by Kiowa upon those who produce oil and gas from Kiowa Indian Country. (R.1)[4] The

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[2](...continued)
Investment v. Kiowa Tribe of Oklahoma, No. 87,032, Okla. Supreme Ct.; *Carl E. Gungoll Exploration Joint Venture v. The Kiowa Tribe of Oklahoma*, No. 87,031, Okla. Supreme Ct.; *Manufacturing Technologies, Inc. v. Kiowa Tribe of Oklahoma*, No. 86,489, Okla. Supreme Ct., cert. *granted*, No. 96-1037, U.S. Supreme Ct.

[3] *Aircraft Equipment I*, 921 P.2d at 361; *see also State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985) ("*Seneca-Cayuga I*"); *Lewis v. Sac and Fox Tribe*, 896 P.2d 503 (Okla. 1994) *cert. denied* ____ U.S. ____, 116 S.Ct. 476, 133 L. Ed. 2d 405 (1995); *Hoover*, 909 P.2d at 61; *First Nat'l. Bank in Altus v. Kiowa, Comanche and Apache Intertribal Land Use Committee*, 913 P.2d 299 (Okla. 1996).

[4] References to ("R. ____") are to the record on appeal in this case, *Aircraft Equipment Company v. Kiowa Tribe of Oklahoma, No. 86,184*, Oklahoma Supreme Court. Because there was a prior (continued...)

severance tax makes up about one-third of Kiowa's total tax revenue. (R. 253) Kiowa uses these tax funds to operate its government: pay employee salaries, maintain real and personal property, fund education and job training programs and supplement federal-tribal programs. (R. 253)

Kiowa defended against this action to enforce the damage award and claimed that sovereign immunity barred such a suit and that seizure of its tax revenues infringed upon its tribal sovereignty and right to self government.[5] (R. 240-280)

The oil and gas production companies who owed the taxes to Kiowa interplead these monies with the trial court. (R. 158, 212, 236, 310, 313-14, 343 409-21) Kiowa asserted that if the companies paid the tax to the court or to Aircraft Equipment, then they failed to pay the tax. If the tax was not paid, then the companies' property was subject to a tax lien created by Kiowa law. (R.188) The companies asked the court to enjoin Kiowa from foreclosing its tax lien. Kiowa opposed the injunction request, claimed its sovereign immunity and contended that the state court had no power to

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[4](...continued)
interlocutory appeal, that record also includes the record in *Aircraft Equipment Company v. The Kiowa Tribe of Oklahoma*, No. 85,975, Oklahoma Supreme Court.

[5] At the trial level, Kiowa asserted its defenses by Answer, by Motion to Dismiss and Objection to Motion for Summary Judgment and at trial. (R. 125) Relevant portions of the Motion to Dismiss and Objection to Motion for Summary Judgment and trial transcripts are in the Appendix, p. 22-35.

stop Kiowa from enforcing Kiowa law upon Kiowa Indian Country. (R. 240-280)

The trial court gave Aircraft Equipment judgment against Kiowa for a creditor's bill.[6] (R. 129-148) It ordered the oil and gas production companies to pay Kiowa's taxes to the Oklahoma County Court Clerk, pending resolution of two other appeals which challenged both the underlying judgment and Oklahoma's authority to seize tribal funds by garnishment.[7] The trial court also enjoined Kiowa from enforcing its tribal law tax lien against the companies for non-payment of the tax.

Kiowa appealed to the Oklahoma Supreme Court. It asserted its tribal sovereign immunity and that the Oklahoma courts had no jurisdiction over it, no authority to seize its assets and no authority to enjoin it from enforcing its laws.[8]

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[6] A copy of the judgment is reproduced in the Appendix, p. 36.

[7] *Aircraft Equipment Company v. The Kiowa Tribe et al.*, No. 82,505, Supreme Court of Oklahoma and *Aircraft Equipment Company v. The Kiowa Tribe*, No. 85,272, Supreme Court of Oklahoma. The appeal, of the underlying judgment, was resolved in *Aircraft Equipment I*. The garnishment appeal remains undecided.

[8] See Petition in Error, Case No. 86, 184, Oklahoma Supreme Court:

> "1. Whether a state district court can enjoin a federally recognized sovereign Indian tribe from enforcing its laws and prohibit a tribe from asserting its statutory lien rights for nonpayment of taxes.

(continued...)

The Oklahoma Supreme Court upheld the trial court. It relied upon three of its prior decisions for the idea that, when a tribe engages in commerce off of Indian Country, Oklahoma courts have "inherent jurisdiction" over that Indian tribe, unless that jurisdiction has been "ousted" by affirmative Congressional action. *See State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77, 88 (Okla. 1985) (*Seneca-Cayuga I*);[9] *Lewis v. Sac and Fox Tribe*, 896 P.2d 503, 511 (Okla. 1994) *cert. denied* ____ U.S. ____, 116 S.Ct. 476, 133 L.Ed.2d 405 (1995) and *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59, 62 (Okla. 1995) *cert. denied* ____ U.S. ____, 116 S.Ct. 1675, 134 L.Ed.2d 799 (Okla. 1996). After having used its own prior case law to establish its judicial authority over a federally recognized Indian tribe, the Oklahoma Supreme Court next concluded that if it had the power in *Aircraft Equipment I* to grant a judgment against Kiowa, then it also must have the power to

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[8](...continued)

2. Whether a state district court has the power to direct that the tax revenues of a federally recognized sovereign Indian tribe be paid to the district court clerk rather than to the tribe which assessed the tax."

[9] As a result of the Oklahoma Supreme Court's decision in *Seneca-Cayuga I*, the Seneca-Cayuga Tribe filed its own suit in federal court to stop the prosecution of the remanded case in Oklahoma courts. The tribe's federal suit resulted in *Seneca-Cayuga Tribe v. State ex rel. Thompson*, 874 F.2d 709 (10th Cir. 1989) ("*Seneca-Cayuga II*"), in which the Tenth Circuit Court of Appeals enjoined the prosecution of the remanded case in *Seneca-Cayuga I*. After *Seneca-Cayuga II*, the Oklahoma Supreme Court did not rely on *Seneca-Cayuga I* until this case.

enforce that judgment. Hence, it concluded that it could lawfully seize Kiowa tax revenues.

The Oklahoma Supreme Court rejected the Tribe's argument that it was immune to suit and that the seizure of its tax revenues infringed upon the its sovereign right to tax. The court also rejected Kiowa's argument that the seizure of tribal taxes infringed upon Kiowa's right to self-government. The court concluded that if seizure of tax revenues did infringe upon trial self-government, then that infringement was legally permissible because the tribe had "ventured outside" of its own Indian Country.

REASONS FOR GRANTING THE WRIT

I. The Oklahoma Supreme Court Decided An Issue Of Indian Tribal Sovereignty In A Way That Conflicts With Applicable Decisions Of This Court And Conflicts With 'Overriding' Congressional Goals Of Fostering Tribal Development.

Commerce and relations with Indian tribes are the province of federal law. United States Constitution, Article I, sec. 8, cl. 3, Art. 2, sec. 2.; *Oneida County N.Y.* v. *Oneida Indian Nation of New York State*, 470 U.S. 226, 105 S.Ct. 1245, 1251, 84 L. Ed. 2d 169 (1985). States have been divested of virtually all authority over Indian commerce and Indian tribes. *Seminole Tribe of Fla.* v. *Fla.*, 517 U.S. ___, 116 S. Ct. 1114, 1126, 134 L. Ed. 2d 252 (1996)

This grant of authority to the federal government is a feature of the United States Constitution. The earlier effort in the Articles of Confederation to give the states some authority over Indian affairs was unworkable. The Articles of Confederation provided:

> The united states in Congress assembled shall also have the sole and exclusive right and power of ... regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits shall not be infringed or violated.

James Madison observed that the attempt to give some authority to the states did not work:

> The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the Articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of the States, and is not to violate or infringe upon the legislative right of any state within its own limits. What description of Indians are to be deemed members of a state is not yet settled, and has been a question of frequent perplexity and contention in federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external

> authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the Articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom by taking away a part and letting the whole remain.

Federalist No. 42 (C. Rossiter, ed., 1961).

Federal regulation of Indian Commerce and Indian affairs has taken various turns over time. But the consistent foundation has been to recognize Indian tribes as "distinct, independent political communities, retaining their original natural rights in matters of local self government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978) *citing Worcester v. Georgia*, 6 Pet. 515, 8 L. Ed. 483 (1832). This foundation recognizes that tribes have the "power to make their own substantive laws in internal matters," *Santa Clara*, 98 S. Ct. at 1675 *citing Roff v. Burney*, 168 U.S. 218, 18 S. Ct. 60, 42 L. Ed. 442 (1897) and to enforce that law in their own forum. *Santa Clara*, 98 S.Ct. at 1675, *citing Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L. Ed. 2d 251 (1959).

A key concept that secures this tribal power is a tribe's immunity to suit. The immunity aspect of tribal sovereignty, like all other aspects, is subject to the superior

and plenary authority of Congress. *Santa Clara,* 98 S.Ct. at 1677. Thus, only a tribe or Congress may create court jurisdiction over a tribe. This jurisdiction is created solely by waiver of a tribe's immunity. *USF&G.*, 60 S.Ct. at 656. Without either tribal or Congressional consent, an attempt to exercise judicial power over an Indian tribe is void. *U.S.F.&G.*, 60 S.Ct. at 657.

While tribal immunity has been criticized,[10] this Court has recognized both the existence and the importance of tribal immunity in Congress's role of regulating Indian affairs.[11] It refused a recent invitation to modify the immunity doctrine. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 910, 112 L. Ed. 2d 1112 (1991), this Court found that Congress, in the exercise of its authority over tribes, has not dispensed with tribal immunity, but, instead, has repeatedly approved this immunity doctrine.[12] Under those circumstances this Court held that it would not modify the long-established principle of tribal sovereign immunity.

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[10] In his concurring opinion, Justice Stevens stated that "The doctrine of sovereign immunity is founded upon an anachronistic fiction." *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 112 L. Ed. 2d 1112 (1991).

[11] "The rule that an Indian tribe is immune from an action for damages ... is, however, an established part of our law." Justice Stevens, concurring, in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 US, 505, 111 S.Ct. 905, 112 L. Ed. 2d 1112 (1991).

[12] See 25 U.S.C. § 450n(1) which specifically preserves tribal immunity to suit.

Citizen Band, 111 S.Ct. at 910. Indeed, this Court has said it will "tread lightly" in an area concerning "tribal sovereignty" and the "plenary authority of Congress." *Santa Clara*, 98 S.Ct. at 1678.

Oklahoma's unique position on tribal immunity is completely at odds with federal law. Federal law provides there is no court jurisdiction over an Indian tribe unless that jurisdiction is *created* by the affirmative act of either Congress or the tribe. *U.S.F&G*, 60 S.Ct. at 656. Oklahoma stands this federal law principle on its head and holds that it has "inherent" court jurisdiction over a tribe, unless that jurisdiction is *destroyed* by an affirmative act of Congress. *Lewis*, 896 P.2d at 511.

When the Oklahoma Supreme Court authorizes seizure of tribal tax money, it unavoidably takes from the federal government a part of the federal power to regulate Indian commerce and Indian affairs. Any government, including tribal governments, must have both money and laws to function. When Oklahoma courts seize tribal taxes and enjoin enforcement of tribal law, Oklahoma courts necessarily assume the power to dictate what the tribal government is able to do. The particular taxes seized in this case were used to pay tribal employees, maintain tribal real and personal property, support tribal educational and job training programs and supplement funding for various federal-tribal programs. (R. 253) When the taxes were seized, those governmental functions were necessarily reduced or eliminated, solely upon the word of Oklahoma courts. This plainly violates the principle that tribal sovereignty is subordinate only to the federal government.

Santa Clara, 98 S. Ct. at 1677; *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L. Ed. 2d 10 (1980).

This Court previously pointed out that the power to tax is an essential attribute of tribal sovereignty because it is a necessary instrument of self-government and territorial management. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 901, 81 L. Ed. 2d 21 (1982). If taxes are necessary for self-government, then diverting taxes to pay a state court judgment must, necessarily, deprive the tribal sovereign of the ability to govern itself.[13] Can there be a more obvious infringement on a tribe's right to self-government than the seizure of its taxes?

Oklahoma's course also collides with Congress because the latter is actively pursuing a policy of fostering tribal development. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 1092, 94 L. Ed. 2d 244 (1987) (Congress's "overriding goal" is to encourage

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[13] The United States' Brief *amicus curiae* in the petition for certiorari *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, No. 96-1037, United States Supreme Court, references the Oklahoma Supreme Court's decision in this case. In making a request to grant certiorari in the *Manufacturing Technologies* case, the United States brief says, at page 18:

> "Finally, as the state supreme court's most recent *Aircraft Equipment* decision underscores, the state courts' holdings leave petitioner subject to attachment or garnishment of tribal tax revenues or other tribal funds. Such attachment represents a significant interference with the Tribe's essential governmental functions."

tribal self-sufficiency and economic development).[14] Congress pursues this goal through many statutory and regulatory devices that make tribal and federal interests parallel. *Id.* at 1093. These devices include the Indian Tribal Judgment Funds Use or Distribution Act[15] (25 U.S.C. § 1401 et seq.) the Indian Self Determination and Education Assistance Act[16] (25 U.S.C. § 450(a) et seq.) and the Indian Financing Act (25 U.S.C. § 1451 et seq.)

Oklahoma's new exercise of jurisdiction over Indian affairs disrupted Kiowa's programs under two of these Acts. In separate, but closely related suits, Oklahoma state courts garnished Kiowa's bank accounts that held tribal tax revenues and monies paid to Kiowa by the United States under both the Indian Tribal Judgment Funds Use or Distribution Act and the Indian Self Determination And

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[14] The Indian Self Determination and Education Assistance Act states: "...In accordance with this policy the United States is committed to supporting and assisting Indian tribes in development of strong and stable tribal governments, capable of administrating quality programs and developing the economies of their respective communities." 25 U.S.C. § 450(a)(b).

[15] 25 U.S.C. § 1401 regulates the use and distribution of funds appropriated in satisfaction of judgments of the Indian Claims Commission or the United States Court of Federal Claims in favor of Indian tribes. Pursuant to § 1403(b)(5), a "significant portion" of the funds are reserved for "common tribal needs, education requirements and such other purposes as the circumstances of the affected Indian tribe may justify."

[16] 25 U.S.C. § 450 *et seq.* The federal government to contract with tribes to administer various social programs. Federal funds are provided for tribal administration of these programs.

Education Assistance Act.[17] *See Hoover v. Kiowa Tribe of Oklahoma. v. First Nat'l Bank of Mountainview, Okla.*, Garnishee, No. CIV-96-1624-L, W.D. Okla., (prior to removal, CJ-91-667 Dist. Ct., Okla. County, Okla.) and *Carl E. Gungoll Exploration Joint Venture v. Kiowa Tribe of Okla. v. Anadarko Bank & Trust Co.*, Garnishee, No. CIV-96-2059-T, W.D. Okla., (prior to removal, CJ-90-10166, Dist. Ct., Okla. County, Okla.)

To this point, a significant amount of Kiowa's funds have been seized by state court process. The seized funds include federal monies allocated for a housing improvement program, food distribution and higher education. Admittedly, these cases are not the subject of this certiorari petition. But they do show the extent of Oklahoma's interference with federal Indian policy.

It is important to recognize that this case is not an aberration in Oklahoma law. It is one step in the pursuit of a major policy change[18] by the Oklahoma Supreme Court.

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[17] These suits are among those that arose from Kiowa's defaults upon other notes used to purchase shares of Clinton-Sherman Aviation, Inc. Again, in these suits, Kiowa did not waive its immunity, but expressly reserved its sovereign rights.

[18] The dissent in the 1994 *Lewis* decision recognized that the Oklahoma Supreme Court had to "effectively overrule" its 1990 decision in *Housing Authority of Seminole Nation v. Harjo*, 790 P.2d 1098 (Okla. 1990). *Lewis*, 896 P.2d at 516. The dissent also recognized that cases not expressly overruled in *Lewis* were *Ahboah v. Housing Authority of Kiowa Tribe*, 660 P.2d 625 (Okla. 1983); *Barnett v. Newcomer*, 307 P.2d 148 (Okla. 1957) and *Swain v. Hildebrand*, 36 P.2d 924 (Okla. 1934); *Lewis*, 896 P.2d at 516, note 1.

A minority of the Oklahoma Supreme Court admits that its position conflicts with the main line federal law on Indian sovereignty. In *Aircraft Equipment I*, Justice Summers said "[t]he majority opinion contravenes the mainstream of contemporary sovereign immunity jurisprudence. It is certainly contrary to *Sac & Fox Nation v. Hanson*, 47 F.3d 1065 (10th Cir. 1995)."[20] *Aircraft Equipment Company I*, 921 P. 2d at 362. The majority, however, persists and finds that its "inherent jurisdiction" position was vindicated when certiorari was denied by this Court in *Lewis* and *Hoover*:

> We follow the jurisprudence of *Hoover* and *Lewis* because in both cases certiorari was denied by the Supreme Court of the United States.

Aircraft Equipment I, 921 P. 2d at 361.

From this statement, it is obvious that review by this Court is necessary. In light of the Oklahoma Supreme Court's reliance upon *Seneca-Cayuga I*, even after the Tenth Circuit stopped state court prosecution in *Seneca-Cayuga II*,[21] it is clear that the Oklahoma Supreme Court will continue to subject tribes to its "inherent jurisdiction" until this Court or Congress says it cannot.

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[20] *Sac & Fox Nation v. Hanson*, 47 F.3d 1065 (10th Cir. 1995) plainly recognized tribal immunity to a suit arising from a tribe's commerce outside Indian Country.

[21] See footnote 9.

Aircraft Equipment I, 921 P. 2d at 361.

From this statement, it is obvious that review by this Court is necessary. In light of the Oklahoma Supreme Court's reliance upon *Seneca-Cayuga I*, even after the Tenth Circuit stopped state court prosecution in *Seneca-Cayuga II*,[21] it is clear that the Oklahoma Supreme Court will continue to subject tribes to its "inherent jurisdiction" until this Court or Congress says it cannot.

II. There Is A Conflict Between Decisions Of The Oklahoma Supreme Court And Decisions Of The Tenth Circuit Court Of Appeals On The Issue Of Tribal Sovereign Immunity.

The Tenth Circuit recognizes that, as a matter of federal law, an Indian tribe is immune to suit, absent a clear waiver by the tribe or Congressional abrogation. *Bank of Okla. v. Muscogee (Creek) Nation*, 972 F.2d 1166 (10th Cir. 1992). This holding is consistent with a long line of decisions by this Court. *Santa Clara Pueblo*, 98 S.Ct. at 1677; *U.S.F.&G.*, 60 S.Ct. at 656.

The Tenth Circuit has also held that, in the absence of tribal or Congressional waiver, tribal immunity to damage suits applied to a tribe's conduct of commerce outside tribal territory. *Hanson*, 47 F.3d at 1035.

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[21] See footnote 9.

In this case, the Oklahoma Supreme Court concluded that when Kiowa "ventured outside its Indian Country" it subjected itself to Oklahoma's jurisdiction and its tribal taxes could be seized by state court process.

The Oklahoma Supreme Court's decision directly conflicts with the Tenth Circuit's *Hanson* decision. Either court would have decided the other court's case in an exactly opposite way.

The direct conflict is particularly acute because it raises the question of whether state judicial power over Indian tribes is limited by federal law.[22] *Hanson*, in which a federal court enjoined a state court from exercising jurisdiction over a tribe, makes plain the extent of the problem of this conflict. Unless there is resolution of these conflicting decisions, tribes that wish to protect their federally recognized rights will be forced to seek federal court relief. With thirty-six federally recognized Indian tribes in Oklahoma, more cases are bound to follow.

It is not desirable to allow this conflict to continue unresolved and generate a series of federal suits and petitions for certiorari. This Court should grant certiorari to provide a resolution of this conflict for both the Oklahoma Supreme Court and the Court of Appeals for the Tenth Circuit.

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[22] In *Aircraft Equipment I*, the Oklahoma Supreme Court refused to follow Tenth Circuit authority and held that it is not bound by a federal court's pronouncement "on a state law question". *Aircraft Equipment*, 921 P. 2d at 361. Presumably this "state law question" is the Oklahoma Supreme Court's position that it has "inherent jurisdiction" over Indian tribes.

III. The Oklahoma Supreme Court Decided A Question Of Tribal Sovereign Immunity Which Has Not, But Should Be, Decided By The Supreme Court.

If there is to be an expansion of state authority over Indian tribes, then that change should come from this Court or from Congress, not from a state court declaring its own powers. Such a change should come from the federal government because commerce with Indian tribes and definition of the nature of tribal sovereignty are matters of federal law. United States Constitution Art. 1, sec. 8, cl. 3; *Santa Clara,* 98 S.Ct. at 1675, 1677.

Review of this case presents the opportunity to set a clear uniform precedent and allow tribes, persons engaging in commerce with tribes, and states to understand the nature and extent of their rights and powers.

CONCLUSION

A writ of certiorari should be granted, the judgment for Respondents reversed, and the case should be remanded with instructions to dismiss for lack of jurisdiction.

Respectfully submitted,

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Appendix

Appendix 1

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

AIRCRAFT EQUIPMENT COMPANY,	)	
	)	
Appellee/Cross Appellant,	)	
	)	
v.	)	
	)	No. 86,184
THE KIOWA TRIBE OF OKLAHOMA,	)	
	)	
Appellant/Cross Appellee,	)	
	)	
WATSON MANAGEMENT GROUP, INC.; KOCH OIL COMPANY, a division of KOCH INDUSTRIES, INC.; AQUILA ENERGY CORPORATION, KERR MCGEE REFINING CORPORATION, ORYX ENERGY CORPORATION, PLAINS LIQUIDS TRANSPORT, INC., SUN COMPANY, INC. (R&M), ASSOCIATED NATURAL GAS, INC., ASSOCIATED TRANSPORT AND TRADING COMPANY, SENEX PIPE LINE COMPANY, and HAMON OPERATING COMPANY,	)	
	)	
Appellees.	)	

Appeal From The District Court Oklahoma County,
The Honorable John M. Amick, District Judge

¶ 0 The District Court in Oklahoma County entered a money judgment in favor of Aircraft Equipment Company, the appellee, and against The Kiowa Tribe of Oklahoma, appellant. The Tribe appealed. The money judgment was affirmed. During the course of the appeal, Aircraft proceeded to enforce its money judgment out of tax funds in the possession of oil and gas operators and purchasers. The District court in Oklahoma County entered judgment on Aircraft's petition for a creditor's bill, directed the funds be paid into the court, allowed costs and attorney fees out of the funds, and restrained the Tribe from enforcing tax liens against the oil and gas operators and purchasers.

JUDGMENT OF THE DISTRICT COURT AFFIRMED.

William J. Robinson Oklahoma City, OK	For Appellee and Cross Cross-Appellant, Aircraft Equipment Company
Shelia D. Tims R. Brown Wallace Oklahoma City, OK	For Appellant, The Kiowa Tribe of Oklahoma
Janis Preslar Oklahoma City, OK	For Appellees, Aquila Energy Corporation, The HomeStake Royalty Corp., Sun Co., Inc. (R&M) and Associated Natural Gas, Inc., Associated Transport & Trading Co.
Jonathan E. Miller Oklahoma City, OK	For Appellee, Oryx Energy Corp.

Myron K. Cunningham Oklahoma City, OK	For Appellee, Kerr-McGee Corp.
Dwight W. Birdwell Ronald J. Pool Oklahoma City, OK	For Appellee, Plains Liquids Transport, Inc.

ALMA WILSON, Justice:

¶ 1 This appeal arises out of a post-judgment proceeding in the District Court of Oklahoma County, Oklahoma, initiated by Aircraft Equipment Company, appellee (Aircraft), to satisfy a money judgment entered by the Oklahoma County District Count against The Kiowa Tribe of Oklahoma, appellant (Tribe). The dispositive questions is whether the state district court may enforce its money judgment against the Tribe. Pursuant to the universal rule that the power to render a judgment includes the power to enforce the judgment, we answer in the affirmative.

¶ 2 The underlying money judgment in favor of Aircraft and against the Tribe was entered in a contract action and affirmed in *Aircraft Equipment Company v. The Kiowa Tribe of Oklahoma*, 921 P.2d 359 (Okla. 1996) (*Aircraft 1*). Aircraft initiated a separate post-judgment proceeding seeking equitable relief in the nature of a creditor's bill during the pendency of the appeal in *Aircraft 1*.[1] Aircraft contends that equitable relief will avoid the cost

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[1]The judgment in *Aircraft 1* is in the amount of $180,000.00 plus interest at the rate of ten percent per annum from April 3, 1990. Prior to seeking equitable relief, Aircraft sought to satisfy its judgment through

(continued...)

and time burdens of multiple garnishments. The Tribe does not challenge the propriety of the equitable remedy, rather it contends that enforcement of the money judgment is contrary to federal law.

¶ 3 Through the creditor's bill, Aircraft sought to satisfy its judgment from funds in the possession of the Tribe's contracted tax collector, Watson Management Group, Inc., and the taxpayers, appellee oil and gas entities.[2] In response, the defending oil and gas entities made requests to interplead the funds into the district court, for attorney fees and costs of the interpleader, and to restrain the Tribe from enforcing its tax liens against them. By its Journal Entry of Judgment filed October 13, 1995, the district court granted Aircraft's request to satisfy its money judgment out of the tax due from the oil and gas entities; directed that the funds be paid into the court; allowed costs and attorney fees as

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[1](...continued)
garnishments. Whether the money judgment against the Tribe may be enforced through garnishment proceedings is pending before this Court in *Aircraft Equipment Company v. The Kiowa Tribe of Oklahoma, et al.*, No. 85,272.

[2]Pursuant to the General Revenue and Taxation Ordinance, adopted by Resolution No. 86-66 of the Kiowa Business Committee of the Tribe, August 11, 1986, an occupation tax is imposed upon working interest owners of mineral rights underlying land owned by the Tribe or its members. The tax is calculated on the gross value of production less the royalty proceeds due the lessors. The tax is reported and paid on a monthly basis. Watson Management Group, Inc., collects the tax for the Tribe from the first purchaser or operator, retaining fifty percent of the collections for its services. The failure to pay the tax, under the General Revenue and Taxation Ordinance, creates a lien on all oil and gas proceeds attributable to the working interest owners (R., vol. I, pp. 257-280)

deductions from the funds in amounts to be determined at a later hearing; and restrained the Tribe from enforcing its tax liens against the appellee oil and gas entities.

¶ 4 The Tribe asks this Court to reverse and vacate the money judgment in *Aircraft 1* and to direct district court dismissal of the petition for a creditor's bill. The Tribe contends that in the absence of its consent to suit or its waiver of sovereign immunity, Oklahoma lacks judicial power to enter or enforce a money judgment against the Tribe. The Tribe argues that *Aircraft 1* is based upon two Oklahoma cases that are inconsistent with federal law, *Lewis v. The Sac and Fox Tribe of Oklahoma Housing Authority*, 896 P.2d 503 (Okla. 1994), *cert. denied* 116 S.Ct. 476 (1995), and *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), *cert. denied* 116 S.Ct. 1675 (1996). The Tribe asserts that *Lewis* and *Hoover* failed to recognize that tribal sovereignty is presumed intact, *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987), and that absolute immunity to damage suits is a significant aspect of tribal sovereignty, *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991).

¶ 5 In *Iowa Mutual Insurance Company v. LaPlante*, *supra*, an insurer sought declaratory judgement that its liability contract, insuring an on-reservation commercial enterprise, did not impose a duty to defend in the tribal court against a claim to recover for personal injury occurring on the reservation. The *LaPlante* Court concluded that the tribal court should determine its jurisdiction and any tribal court remedy should be exhausted, as a matter of

comity rather than jurisdiction, before the federal district court considers the declaratory judgment claim. *LaPlante* does not stand for the proposition that a presumption of sovereignty bars the exercise of state judicial power over a controversy arising out of an Indian tribe's commercial activity outside of Indian county as presented in *Aircraft 1*.

¶ 6 In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe, supra*, the state assessed the Potawatomi Tribe for taxes which the Tribe had failed to pay on cigarettes sold to tribal members and non-members at the Tribe's convenience store on Indian country land. The Court concluded that the doctrine of tribal sovereign immunity protects the Potawatomi Tribe from suit by the state to collect its assessment for delinquent taxes. Following *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), the Court recognized that the state's taxing power may reach inside of Indian country and that the immunity doctrine does not shield an Indian tribe from all state-law obligations to assist in the collection of state taxes. Concluding that the immunity doctrine prevented the state from collecting its delinquent taxes directly from the tribe, the *Citizens Band Potawatomi* opinion observes that the doctrine does not prevent collection of taxes from individual tribal agents and officers, nor individual Indians dealing with non-Indians within Indian country, or non-Indians dealing

with Tribe outside Indian country.[3] In his concurring opinion in the *Citizen Band Potawatomi* case, Justice Stevens viewed the foundation of the doctrine of tribal sovereign immunity as an anachronistic fiction. Recognizing that an Indian tribe is immune from an action for damages absent its consent and citing *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940), Justice Stevens expressed doubt that the immunity extends to cases arising from a tribe's conduct of commercial activity outside

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[3]The dissent reads the *Citizens Band Potawatomi* opinion as recognizing that Oklahoma has a right to secure a judgment against the Tribe for the delinquent tax due on the Tribe's sales of cigarettes to non-tribal members, without a judicial remedy to enforce the judgment. That was not the case. The *Citizen Band Potawatomi* Court determined that the state had a right to impose tax burdens on non-Indians within Indian country, but it had no judicial remedy for the collection of delinquent taxes directly from the Tribe even though the taxes should have been collected from the non-Indian consumers when purchasing cigarettes at the Tribe's convenience store located on Indian country. The *Citizen Band Potawatomi* Court concluded that the doctrine of tribal sovereign immunity prevented the Oklahoma Tax Commission from collecting delinquent sales tax through the "most efficient remedy" -- collection from the single retailer (the Tribe) rather than from the countless consumer/purchasers. The *Citizens Band Potawatomi* discussion of "remedies" concerns the statutory tax collection method of assessing a retailer for delinquent taxes that the retailer failed to collect from the consumer/taxpayers; it does not relate to remedies available to a judgment creditor as herein involved. Nothing in the *Citizens Band Potawatomi* opinion intimates that the "State of Oklahoma, as a judgment creditor, does not have [a judicial remedy] against the Indian tribe," as suggested by the dissent.

its own territory.[4] Neither the opinion, nor the concurring opinion, in the *Citizen Band Potawatomi* case teaches that a federally recognized Indian tribe is absolutely immune from suit for money judgment as we allowed and affirmed in *Aircraft 1*. We expressly reject the Tribe's argument that the doctrine of tribal immunity has a greater reach than that of the state or federal governments.[5]

¶ 7 The dissent would declare, as urged by the Tribe, that Oklahoma's judicial power can only be extended over her Indian tribes upon express tribal or congressional consent. In *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77, 85 (1985), we rejected the concept that Oklahoma's judicial authority does not reach Indian tribes within the state's borders, unless Congress or the Tribe has expressly provided otherwise. Our *Seneca-Cayuga* holding was grounded in the

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[4]In *United States v. United States Fidelity & Guaranty Co.*, *supra.*, the U.S. Supreme Court determined that 34 Stat. 137, 144, authorized suit against the United States, on behalf of the dependent Choctaw and Chickasaw tribes, only in the federal court in Indian Territory and therefore, refused to enforce a Missouri money judgment against the Tribes. The congressional enactment published at 34 Stat. 137, approved April 26, 1906, provided, *inter alia*, for the dissolution of the Five Civilized Tribes in Indian Territory and fixed the rolls of citizens of each of the Five Civilized Tribes.

[5]The Tribe asserts that the doctrine of tribal sovereignty is an absolute immunity protecting it from suit arising out of its torts or contracts arising outside Indian country. The dissent would extend tribal immunity as an absolute bar to suit or other legal process initiated by a judgment creditor to satisfy a valid judgment against a tribe. Both the Tribe and the dissent press for greater immunity from suit than is enjoyed by either the state or federal government.

early congressional enactments surrounding statehood.[6]

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[6]*State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d at 86-87. The State of Oklahoma has a unique history in regard to relations with Indian tribes within her boundaries. R. Strickland, *Felix S. Cohen's Handbook of Federal Indian Law*, (1982 Ed.), p. This history reveals that the State of Oklahoma, from the time of statehood, has been vested with judicial jurisdiction over all her citizens. The Organic Act of May 2, 1890, 26 Stat. 81, fixed the boundaries of Oklahoma Territory and Indian Territory and established territorial governments therefor. In the 1890's lands of most of the tribes in Oklahoma Territory were allotted. *Id.*, at 774. In 1893, the Dawes Commission was established to facilitate the allotment of the lands of the Five Civilized Tribes in Indian Territory. *Id.* The Curtis Act of June 28, 1898, 30 Stat. 495, intended to expedite the allotment process, abolished the tribal governments in Indian Territory, including the tribal courts. The Five Civilized Tribes attempted to have Indian Territory admitted as the state of Sequoyah. In the face of congressional opposition to the proposed state of Sequoyah, the Five Civilized Tribes supported the admission of Oklahoma Territory and Indian Territory as a single state of the United Stats. Casey, O., *And Justice for All*, (1989). The Enabling Act of June 16, 1906, 34 Stat. 267, permitted the two territories to seek statehood for the State of Oklahoma. Section 2 of the Enabling Act expressly provided that U.S. citizens and members of Indian tribes or nations may vote and participate in the formation of the constitutional state government for the State of Oklahoma. The Organic Act at § 43 and the Enabling Act at § 2 contemplate that Indians residing in Indian Territory and Oklahoma Territory would be assimilated as citizens of the United States and the State of Oklahoma. Section 12 of the Organic Act extended the jurisdiction of the district courts in Oklahoma Territory to all controversies involving members or citizens of an Indian tribe or nation except controversies arising between Indians of the same tribe while sustaining their tribal relations, and § 30 extended the jurisdiction of the courts in Indian Territory to all civil and criminal cases except cases arising in the territory in which members of an Indian nation were the only parties. And, §§ 19 and 20 of the Enabling Act declared that the courts of original jurisdiction for the State of Oklahoma would be the successor to all courts of original jurisdiction in Indian Territory and Oklahoma Territory. In *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 63 S.Ct. 1284, 87 L.Ed. 1612 (1943), the United States Supreme Court observed that the Oklahoma Indians are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and tax exemptions and that they retain remnants of tribal sovereignty with no effective tribal autonomy.

Similar to the *Citizen Band Potawatomi* case, the *Seneca-Cayuga* case recognized that a state generally has authority over non-Indians within Indian country and Indians and their activities outside of Indian country. As to the activities of the tribe and its members within Indian country, our *Seneca-Cayuga* opinion concluded that, through the years, the doctrine of tribal sovereign immunity has been displaced by the principles of federal preemption and infringement on tribal self-government. Following the *Seneca-Cayuga* reasoning, *Lewis v. The Sac and Fox Tribe of Oklahoma Housing Authority*, *supra*, held that Oklahoma courts have constitutionally-invested cognizance, concurrent with federal courts, to entertain any federal-law claim not explicitly withdrawn from their authority by some congressional enactment, so long as state judicature does not infringe upon tribal self-government. *Lewis* involved a contractual dispute between an Indian home buyer and an Indian housing authority arising out of the housing authority's promise to convey its interests in real property. And applying *Lewis*, *Hoover v. Kiowa Tribe of Oklahoma*, *supra*, held that a contract between an Indian tribe and non-Indian executed outside of Indian country is enforceable in state court. *Hoover* involved a contractual dispute between the Kiowa Tribe and a private individual arising out of the Tribe's promise to pay for 5,000 shares of common stock in the Clinton-Sherman Aviation, Inc. We find no merit to the Tribe's argument that *Lewis*, *Hoover*, and *Aircraft 1* are contrary to federal law.

¶ 8 We adhere to the long-standing, well-established rule that if a court has the power to render a judgment, it has the power to enforce its judgment and give it effect through the proper processes. *United States ex rel. Riggs v. Johnson County*, 6 Wall. 166, 18 L.Ed. 768 (1868). We determined

in *Aircraft 1* that the district court sitting in Oklahoma County had the power to render a money judgment against the Tribe for its failure to perform a contract executed outside of Indian country and we affirmed the summary judgment entered in favor of Aircraft and against the Tribe. Aircraft, as a judgment creditor, sought to enforce its judgment against the Tribe, as the judgment debtor, through an authorized equitable remedy.[7] Accordingly, we concluded that the District Court in Oklahoma County had the power to enforce its money judgment affirmed in *Aircraft 1* through the equitable remedy in the nature of a creditor's bill.

¶ 9 The Tribe asserted before the district court and asserts in this appeal that exercise of state judicial power to seize tribal tax revenues impermissibly infringes upon the Tribe's federally protected sovereign rights. Citing *Merrion v. Jacarilla Apacache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982), the Tribe contends that the power to tax is an essential attribute of Indian sovereign rights. Without citation of authority, the Tribe argues that the power to tax is meaningless if the state has the power to seize the fruits of the taxing power or restrain tax enforcement. Our independent research reveals no authority holding that satisfaction of valid, enforceable money judgment against a taxing entity out of its tax revenues renders the power to tax meaningless or otherwise diminishes or surrenders the power to tax.

¶ 10 The Tribe also argues that enforcement of the money judgment infringes upon tribal self-government contrary to *Lewis v. Sac and Fox Tribe of Oklahoma Housing Authority*, *supra*. Enforcement of a money judgment against an Indian tribe in a court of competent jurisdiction is

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[7] 12 O.S. 1991, § 841.

obviously a burden upon the Tribe. However, *Lewis* does not suggest that the district court must make inquiry as to whether a state-court, post-judgment enforcement proceeding burdens the Tribe. *Lewis* requires a preliminary inquiry to test the outer limits of state-court cognizance to render judgment on the Indian interests in the initial controversy, the contract controversy in *Aircraft 1*. We view the burden of enforcement of the money judgment in favor of Aircraft and against the Tribe as legally permissible where the Tribe ventured outside its Indian country, engaged in commercial activity for economic gain, and created a contract controversy which was ultimately settled in a court of competent jurisdiction by the money judgment sought to be enforced.[8] Any other view would render the state court judgment meaningless and deny Aircraft a peaceful means of satisfying its money judgment.

¶ 11 That the Tribe had the opportunity to challenge Aircraft's right to pursue a creditor's bill is not an issue. In response to Aircraft's summary judgment motion, the Tribe elected to reiterate its challenge to the power of the court to render the money judgment in the first instance and to enforce the judgment. The Tribe did not, however, challenge the availability or propriety of the equitable remedy. Below and open on Appeal, the parties represent that there is no dispute as to any fact material to this post-judgement controversy. Under these circumstances, summary judgment granting the petition for a creditor's bill was proper.

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[8]Indians going outside Indian country are subject to the nondiscriminatory state law applicable to all the state's citizens, unless otherwise expressly provided by federal law. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973).

¶ 12 Aircraft, in its cross-appeal, challenges the interpleader. Aircraft contends the district court abused its power in ordering payment of the Tribe's funds in the possession of the oil and gas entities into the court. An order for holding funds in the court is within the discretion of that court.[9] and will not be disturbed by the appellate court except upon a showing of clear abuse. It is undisputed that both Aircraft and the Tribe claim entitlement to the funds ordered to be paid into the court. Title 12 O.S. 1991, § 2022 provides that a defendant who is exposed to double or multiple liability may obtain interpleader by way of cross-claim or counterclaim. This is precisely the situation confronting the oil and gas entities in the court below. We find no abuse of discretion in the district court's order for payment of the funds into the court.

JUDGMENT OF THE DISTRICT COURT AFFIRMED.

HODGES, LAVENDER, HARGRAVE, OPALA and WILSON, JJ, concur.

SIMMS and WATT, JJ., concur in result.

KAUGER, C.J., and SUMMERS, V.C.J., dissent.

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[9] *City of Barnsdall v. Curnutt*, 210 Okla. 508, 510, 207 P.2d 320, 322 (1949).

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

AIRCRAFT EQUIPMENT COMPANY,	)	
	)	
Appellee/Cross-Appellant,	)	
	)	
v.	)	
	)	No. 86,184
THE KIOWA TRIBE OF OKLAHOMA,	)	
	)	
Appellant/Cross-Appellee,	)	
	)	
WATSON MANAGEMENT GROUP, INC.; KOCH OIL COMPANY, a division of KOCH INDUSTRIES, INC.; AQUILA ENERGY CORPORATION; KERR MCGEE REFINING CORPORATION; PLAINS LIQUIDS TRANSPORT, INC.; SUN COMPANY, INC. (R&M); ASSOCIATED NATURAL GAS, INC.; ASSOCIATED TRANSPORT AND TRADING COMPANY; SENEX PIPE LINE COMPANY; and HAMON OPERATING COMPANY,	)	
	)	
Appellees.	)	

SIMMS, J., CONCURS IN RESULT:

Time has passed for this challenge to the State's assertion of jurisdiction over the Tribe as barred by sovereign immunity. This Court's decision in Aircraft 1 holding the Tribe subject to suit for money damages arising from breach of the Tribe's contractual obligations is final and is the law of the case. The instant proceeding is brought only to enforce that judgment which is valid in all respects and is properly allowed by the Court.

The dissent's reliance on *Oklahoma Tax Comm'n. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905 (1991), is misplaced as that decision does not involve questions regarding the effects of sovereign immunity on efforts of the State to enforce an existing judgment in its favor against an Indian tribe. Rather, *Citizen Band* concerns issues of the tribe's immunity from suit by the state. It was this immunity from a lawsuit which the court was discussing as barring the State from its "most efficient remedy" in the particular quote set forth by the dissent. Neither the quotation nor the greater scope of the court's decision reached the question presented in the instant matter: whether the judgment entered against the Tribe in Aircraft 1, which is final and valid, may not be enforced by means of ordinary judicial process by the district court which rendered it.

Appendix 16

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

AIRCRAFT EQUIPMENT COMPANY,	)	
	)	
Appellee/Cross Appellant,	)	
	)	
v.	)	
	)	No. 86,184
THE KIOWA TRIBE OF OKLAHOMA,	)	
	)	
Appellant/Cross Appellee,	)	
	)	
WATSON MANAGEMENT GROUP, INC.; KOCH OIL COMPANY, a division of KOCH INDUSTRIES, INC.; AQUILA ENERGY CORPORATION, KERR MCGEE REFINING CORPORATION, ORYX ENERGY CORPORATION, PLAINS LIQUIDS TRANSPORT, INC., SUN COMPANY, INC. (R&M), ASSOCIATED NATURAL GAS, INC., ASSOCIATED TRANSPORT AND TRADING COMPANY, SENEX PIPE LINE COMPANY, and HAMON OPERATING COMPANY,	)	
	)	
Appellees.	)	

Summers, V.C.J., dissenting, with whom Kauger, C.J. joins.

¶ 1 My views on the judgment itself are expressed in the opinion dissenting from *Aircraft Equipment Co. v. Kiowa Tribe*, 921 P.2d 359, 362 (Okla. 1996). I also dissent from today's decision to permit collection of the judgment from the Tribe in derogation of Kiowa tribal sovereign immunity.

¶ 2 The majority concludes that if the state has the power to render a judgment against a tribe, it thus has the power to enforce the judgment. This sounds reasonable, but it is in direct conflict with the United States Supreme Court case of *Oklahoma Tax Comm'n v. Citizens Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991).

In *Citizens Band*, with Chief Justice Rehnquist writing, the Court opened by saying:

> Indian tribes are "domestic dependent nations" that exercise inherent sovereign authority over their members and territories. *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831). Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.[1] *Santa Clara Pueblo v. Martinez*, 436 U.s. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978). 498 U.S. at 507

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[1]This rule is not recognized by the Supreme Court of Oklahoma. See *Hoover v. Kiowa Tribe*, 909 P.2d 59 (Okla. 1995); *Aircraft Equipment Co., supra.*

It went on to say:

> A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court and has been reaffirmed in a number of cases. (Citations omitted) 498 U.S. at 510

Then after discussing Congress' consistent reluctance to undercut tribal sovereign immunity it said:

> Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity. 498 U.S. at 510

The Supreme Court went on to hold that Oklahoma had the power to tax the Tribe's sale of cigarettes to non-tribal members. However, the Court recognized that while a judgment in favor of the Oklahoma Tax Commission for the tax on such sales was valid, the Tax Commission lacked the power to enforce it directly against the Tribe. As to enforcement of such a judgment the Court stated:

> There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate remedy. We have never held that individual agents or officers of a tribe are liable for damages in actions brought by the State. *See Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). And under today's decision, either by seizing unstamped

> cigarettes off the reservation, *Colville*, *supra*, 447 U.S., at 161, 162, 100 S.Ct., at 2085-2086, or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores, *City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122 (10th Cir. 1990). States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax. See 48 Stat. 987, as amended, 25 U.s.C. § 476. And if Oklahoma and other States similarly situated find that none of these alternative produce the revenues which they are entitled, they may of course seek appropriate legislation from Congress. (emphasis added)

Id. at 514. This paragraph clearly shows that in lawsuits against Indian tribes a right does not necessarily carry with it a complete remedy, according to the U.S. Supreme Court. The majority's position to the contrary today is inconsistent with *Citizens Band*.

¶ 3 The Court attempts to distinguish *Citizens Band* by pointing out that suits against individuals or officers of the tribe are permitted, and that the state as judgment creditor could also pursue the wholesalers who provided the unstamped cigarettes. That is true. What today's Court fails to note is that the present action is not one against individual officers of the tribe nor some third party. This case is against the Kiowa Tribe of Oklahoma. It is strange, to say the least, that this Court gives Aircraft Equipment Co., as a

judgment creditor, a remedy against an Indian tribe which the United States Supreme Court says the State of Oklahoma, as a judgment creditors, would not have and could not use against an Indian tribe. "There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy. . . ." *Id.*

¶ 4 Enforcement of a judgment by means of judicial process against the Tribe is unlawful. I respectfully dissent.

Appendix 21

IN THE DISTRICT COURT
OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

AIRCRAFT EQUIPMENT COMPANY, a partnership,	)	
Plaintiff,	)	
vs.	)	No. CJ-94-2522
WATSON MANAGEMENT GROUP, INC.; KOCH OIL COMPANY, a division of KOCH INDUSTRIES, INC.; and THE KIOWA TRIBE OF OKLAHOMA,	)	
Defendants.	)	

THE KIOWA TRIBE'S MOTION TO DISMISS, OBJECTION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

Defendant, the Kiowa Tribe of Oklahoma (the "Tribe"), moves to dismiss this action for lack of jurisdiction and for failure to join indispensable parties. The Tribe also objects to plaintiff's motion for summary judgment. The Tribe submits the following brief in support of its request. Plaintiff's motion for summary judgment is set to be heard

on May 26, 1995, at 9:00 a.m. The Tribe requests that its Motion to Dismiss be heard at the same time.

STATEMENT OF THE CASE

Plaintiff filed a creditor's bill which seeks to satisfy a judgment entered against the Tribe by seizing Tribal oil and gas severance taxes paid by various defendants.[1] This action should be dismissed because the Court has no jurisdiction over the Tribe. The Tribe is a federally recognized sovereign. A state court has no jurisdiction over the Tribe unless the federal government so provides or the Tribe consents to such jurisdiction. Neither is present in this context. The federal government has not granted this Court jurisdiction and the Tribe has not agreed to it.

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[1] Plaintiff's underlying judgment is currently on appeal before the Oklahoma Supreme Court. In a related action, plaintiff garnished Tribal severance taxes to satisfy a portion of its judgment. The garnishments are also on appeal before the Oklahoma Supreme Court.

Appendix 23

STATEMENT OF UNDISPUTED FACTS[2]

1. The Tribe is a federally recognized Indian tribe.

2. The plaintiff has collected approximately $68,000 through garnishment proceedings in the case, *Aircraft Equipment Co. v. The Kiowa Tribe of Oklahoma*, Case No. CJ-92-10176. All of the garnished funds are oil and gas severance taxes collected under a taxation ordinance adopted by the Tribe and imposed against entities which remove oil or gas from Indian country land within the Tribe's jurisdiction.[3] This severance tax is not imposed against the royalty owners. (A true and correct copy of the ordinance is attached as Exhibit A to the Stipulation.)

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[2] Plaintiff already agreed to these facts by a Stipulation entered in a related case, *Aircraft Equipment Co. v. The Kiowa Tribe of Oklahoma*, Case No. CJ-92-10176. A copy of the Stipulation is attached as Exhibit A. The Tribe requests that this Court take judicial notice of the Stipulation pursuant to 12 Okla. Stat. §2202.

[3] "Indian country" is defined as: (a) all land within the limits of any Indian reservation and under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-ways running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. 18 U.S.C. §1151 (1994).

3. The Ordinance was adopted by the Tribe as an exercise of its sovereign power to tax and as authorized by the Kiowa Constitution, Art. V., Sec. 2. The Kiowa Constitution was approved by the United States Commissioner of Indian Affairs. (A true and correct copy of the Kiowa Constitution is attached as Exhibit B to the Stipulation.)

4. Due to plaintiff's garnishments, the Tribe has lost all of the revenue from its severance tax since December, 1993.

5. The Tribe's severance tax constitutes approximately 33% of its total tax revenue. The severance tax is used to fund tribal undertakings, including the following: (a) pay salaries to tribal employees, (b) maintain tribal real and personal property, (c) support education and job training programs and (d) supplement the funding of various federal-tribal programs.

THE TRIBE'S RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS

1. The Tribe admits that plaintiff recovered a judgment against the Tribe in *Aircraft Equipment Co. v. The Kiowa Tribe of Oklahoma*, Case No. CJ-92-10176. The Tribe asserts that the Oklahoma County District Court has no jurisdiction to enter a judgment against it. The Tribe's appeal of jurisdiction is pending before the Oklahoma

Supreme Court in *Aircraft Equipment Co. v. The Kiowa Tribe of Oklahoma*, Appeal No. 82,505.

2. The Tribe admits that plaintiff executed on its judgment and garnished approximately $68,000 in tribal severance tax funds. (See Undisputed Fact No. 2 above.)

3. The Tribe admits that Judge Ricks denied the Tribe's claim for exemption in the garnishment proceedings. The Tribe asserts that the Oklahoma County District Court has no jurisdiction to garnish a sovereign's property and tax revenues. The Tribe's appeal of the garnishment is pending before the Oklahoma Supreme Court in *Aircraft Equipment Co. v. The Kiowa Tribe of Oklahoma*, Appeal No. 85,272.

4. The Tribe admits that various defendants possess funds which are lawfully owed to the Tribe pursuant to its severance tax.

ARGUMENTS AND AUTHORITIES

I.
THIS COURT HAS NO JURISDICTION OVER THE TRIBE AND NO AUTHORITY TO SEIZE A SOVEREIGN'S TAX REVENUES.

Under federal law and Oklahoma law, this Court has no jurisdiction over the Tribe and no jurisdiction to order the defendants to pay tribal severance tax funds to plaintiff. This case should be dismissed.

A. Federal Law.

Suits against federally recognized Indian tribes are barred by sovereign immunity unless the Tribe clearly waives its immunity or Congress provides for jurisdiction. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112 (1991); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S. Ct. 1670, 56 L.Ed. 2d 106 (1978). Tribal immunity remains intact and is a vital part of federal policy. Oklahoma Tax Comm'n, 111 S.Ct. at 910 (Congress retains its overriding goal to promote Indian self-government and thus the Court is "not disposed to modify the long-established principle of tribal sovereign immunity").

In this case, there is neither waiver nor congressional abrogation. It is undisputed that the Tribe has not waived its sovereign immunity and Congress has not nullified the Tribe's immunity from suit. The Tribe did not waive its immunity in the underlying judgment, in the garnishment proceedings or in this action.

Federal courts have allowed suits against Indian tribes where tribal interests conflicted with those of the State on taxation or regulatory issues. When doing so, the United States Supreme Court uses two standards to determine whether there is an exception to tribal immunity which allows a State court to exercise jurisdiction: preemption by federal action and infringement upon tribal self-government. Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965). New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983); State ex rel. May v. Seneca-Cayuga Tribe, 711 P.2d 77, 84 (Okla. 1985).

In this case, the State's regulatory or taxation scheme is **not** at issue and thus these two standards are not applicable. If, however for the sake of argument, the preemption and infringement standards are applied, neither allow the district court to exercise jurisdiction to seize tribal tax revenues.

* *

2. Infringement upon Tribal Self-Government

There is a strong federal policy which promotes the self-government and economic development of Indian tribes. Oklahoma Tax Comm'n, 111 S.Ct. at 910. This strong policy is backed by an extensive legislation designed to preserve tribal entities and assets. 25 U.S.C. §450 et seq.; 25 U.S.C. §450a(b) (Congress declares its policy to be a strong commitment to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing economies of their respective communities).

The Tribe can satisfy this federal mandate and function as a sovereign solely through the exercise of its power to tax. The Tribe's taxing power is essential to raise funds to operate its government. Without tax revenues, it cannot act.

If a State seizes tribal property, then it restricts the tribe's ability to govern. Such a restriction is particularly acute when, as in this case, the seized property is admitted to be one-third of the Tribe's total tax revenues. The taking of such funds by the State directly infringes upon and defeats

an overriding federal policy. The district court did not have jurisdiction or authority to order the Tribe's tax revenues paid to plaintiff.

* *

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OF OKLAHOMA

Appendix 29

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

AIRCRAFT EQUIPMENT COMPANY, a joint venture,	)	
Plaintiff,	)	
vs.	)	No. CJ-92-10176
THE KIOWA TRIBE OF OKLAHOMA,	)	
Defendant,	)	
AND	)	
WATSON MANAGEMENT GROUP, INC.,	)	
Garnishee.	)	

STIPULATION

Plaintiff, Aircraft Equipment Company ("Aircraft),

(EXHIBIT "A" TO KIOWA TRIBE'S MOTION TO DISMISS, OBJECTION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT)

and defendant, the Kiowa Tribe (the "Tribe"), stipulate that the following facts are true and correct for the purposes of the proceedings in the above-styled case:

1. The Tribe is a federally recognized Indian tribe.

2. The plaintiff has collected approximately $68,000 through its garnishment proceedings in this case. All of these funds are oil and gas severance taxes collected by Watson Management Group, Inc. ("Watson"), as an independent contractor pursuant to a contract with the Tribe, under a taxation ordinance adopted by the Tribe and imposed against entities which remove oil or gas from Indian country land within the Tribe's jurisdiction. (A true and correct copy of the Watson contract is attached hereto as Exhibit A) This severance tax is not imposed against the royalty owners. (A true and correct copy of the ordinance is attached as Exhibit B.)

3. The Ordinance was adopted by the Tribe as an exercise of its sovereign power to tax and as authorized by the Kiowa Constitution, Art. V., Sec. 2. The Kiowa Constitution was approved by the United States Commissioner of Indian Affairs. (A true and correct copy of the Kiowa Constitution is attached hereto as Exhibit C.)

4. The judgment creditor has collected the tax revenues by serving garnishment summons upon Watson each month at the approximate time the tax revenue checks are received by Watson. Hence, the Tribe has lost all of the revenue from its severance tax since December, 1993.

5. The Tribe's severance tax constitutes approximately 33% of its total tax revenue. The severance tax is used to fund tribal undertakings, including the following: (a) pay salaries to tribal employees, (b) maintain tribal real and personal property, (c) support education and job training programs and (d) supplement the funding of various federal-tribal programs.

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AIRCRAFT EQUIPMENT COMPANY

Certificate of Service

I hereby certify that on the _____ day of November, 1994, a true and correct copy of the above and foregoing instrument was deposited in the United States mail with postage prepaid, addressed to the following:

Ryland L. Rivas, Esq.
628 Choctaw Avenue
Chickasha, Oklahoma 73018

s/Sheila D. Tims

(EXHIBITS OMITTED)

Appendix 33

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS HAD ON THE 14th DAY OF AUGUST, 1995 BEFORE THE HONORABLE JOHN M. AMICK DISTRICT JUDGE OF OKLAHOMA COUNTY OKLAHOMA

* *

BY MR. WALLACE... These are the laws of a sovereignty government recognized by the federal government of the United States of America. Now, I know it is very problematical how much authority a Court can exercise over an Indian tribe, but the most, what should I say, the most liberal description of this Court's jurisdiction says that it cannot interfere with an Indian tribe's right to self govern. A very key issue to the right to self govern is a right to enact taxation laws, collect the taxes from those laws and use the proceeds in governmental enterprises. That's all the Kiowa Tribe is doing here, so I think -- I think, like I said, I think this issue is going to present itself in any number of ways that one wishes to look at it, whether it be from the standpoint that the federal law protects these tax revenues or whether it be from the standpoint that the Court must do complete justice among the parties in equity and it can't be done. Either of those two ways will present this issue. We simply are not in a situation where the Court can grant a creditor's bill and walk away, leaving the tribe to enforce its tax liens. I mean, if we do that, what the tribe winds up doing, is the tribe winds up going to federal Court where there's special jurisdiction over such matters, filing a

foreclose against the working interest in this case and seeking to, you know, realize its money there. (TR. p. 10-11)

* * * * * * * * * * * * * * * * * * *

THE COURT ...if we have jurisdiction to enter a judgment against a tribe, I think we have jurisdiction to enforce that judgment. Now, I am painfully unaware of the Indian law. I just don't have any idea about it. It never occurred to me that I would ever have anything to do with it. I have neglected to attend these sovereignty symposiums, where I presume they deal with the affect of Indian law in the courts here in the state of Oklahoma, but I just don't have any idea about it. But I'm -- based on the assumption that we have jurisdiction to render the judgment, I'm going to assume that we have jurisdiction to enforce the judgment and I think that the creditor's bill is an appropriate method of enforcing the judgment. And if I grant a creditor's bill, I certainly have to, I think in all good conscious, restrain the tribe from enforcing their lien against the working interest owners who are party to this case. So I think what all that amounts to is a judgment in favor of the plaintiff, Aircraft Equipment Company, on the creditor's bill. (TR. p. 19-20)

* * * * * * * * * * * * * * * * * * * *

Appendix 35

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

AIRCRAFT EQUIPMENT COMPANY, a joint venture,	)
Plaintiff,	)
vs.	)No. CJ-94-2522
THE KIOWA TRIBE OF OKLAHOMA AQUILA ENERGY CORPORATION, THE HOME-STAKE ROYALTY CORPORATION, KERR McGEE REFINING CORPORATION, ORYX ENERGY CORPORATION, PLAINS LIQUIDS TRANSPORT, INC., SUN COMPANY, INC. (R & M), ASSOCIATED NATURAL GAS, INC., ASSOCIATED TRANSPORT AND TRADING COMPANY, SENEX PIPE LINE COMPANY, and HAMON OPERATING COMPANY,	)
Defendant.	)

JOURNAL ENTRY OF JUDGMENT

On the 14th day of August, 1995 there came on for trial Plaintiff's Petition for equitable relief in the nature of a creditor's bill, Plaintiff appearing by Counsel William J.

Robinson; The Kiowa Tribe of Oklahoma appeared by Counsel R. Brown Wallace and Shelia D. Tims; Aquila Energy Corporation appeared by Counsel Jan Preslar and Oryx Energy, Inc. appeared by Counsel Jonathan Miller;, and the Court, having heard argument of counsel, and having examined the real evidence introduced and the stipulation of the parties, finds that the Plaintiff has sustained the material allegations of its Petition and is entitled to Judgment subjecting to the satisfaction of the Plaintiff's Judgment in District Court of Oklahoma County, Case No. CJ-92-10176, styled Aircraft Equipment Company v. The Kiowa Tribe of Oklahoma, et al., the severance taxes due from the defendant oil companies to the Kiowa Tribe of Oklahoma as same accrue, provided, however, that said moneys be paid into court, rather than to the Plaintiff, until further order of the Court; and the Court further finds that the tribes should be restrained from enforcing its lien against the oil companies who are a party to this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff, Aircraft Equipment Company, have and recover Judgment subjecting to the Judgment of Plaintiff, as aforesaid, the moneys accrued and accruing owing by the defendant oil companies to The Kiowa Tribe of Oklahoma, and being paid into Court pursuant to this Court's Order of July 5, 1995; provided, however, that said moneys be paid into Court until further order of the Court and it is further ordered that The Kiowa Tribe of Oklahoma be, and the same is and hereby restrained from enforcing its lien against the defendant oil companies herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT the Court's July 5, 1995 Order, attached hereto, remains in effect and is incorporated as though fully set forth herein; and it is further ordered that a determination of the reasonable fees recoverable by the defendants be stayed until the appeal of the Kiowa Tribe on the underlying judgment, in the case stayed Aircraft Equipment Company v. The Kiowa Tribe of Oklahoma, et al., Case No. 85,272, in the Supreme Court of the State of Oklahoma, is resolved.

Dated this 13th day of October, 1995.

S/John M. Amick
JUDGE OF THE DISTRICT COURT

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Appendix 39

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

AIRCRAFT EQUIPMENT COMPANY, a partnership,	)	
Plaintiff,	)	
vs.	)	No. CJ-94-2522
WATSON MANAGEMENT GROUP, INC.; KOCH OIL COMPANY, a division of KOCH INDUSTRIES, INC.; and THE KIOWA TRIBE OF OKLAHOMA,	)	
Defendants.	)	

ORDER

On this 26th day of May, 1995, the following came on for hearing before the undersigned Judge:

1. Motion for Summary Judgment of Plaintiff against Judgment Debtor, the Kiowa Tribe of Oklahoma;

(EXHIBIT "A" TO JOURNAL ENTRY OF JUDGMENT OF AUGUST 14, 1995)

2. Motion to Dismiss filed by the Kiowa Tribe of Oklahoma;

3. Order of May 3, 1995, to show cause why 1) Aquila Energy Corporation should not be discharged upon its payment to the clerk of the Court of disputed severance taxes; 2) Plaintiff and Kiowa Tribe be enjoined from seeking from Aquila monies paid into Court pursuant to May 3, 1995 Order; and 3) why attorney's fees should not be paid as for interpleader;

4. Motion of Plains Liquids Transport, Inc. to pay money into Court and for Attorney's Fees as for interpleader;

5. Motion of The Home-Stake Royalty Corporatio to pay money into Court, be dismissed from this action, enjoin Plaintiff, Kiowa Tribe of Oklahoma and Watson Management Group, Inc. from making any further claim against The Home Stake Royalty Corporation for severance taxes paid into Court, and Attorney's Fees as for interpleader;

Appearances were made for the parties as shown:

Party	Counsel
Plaintiff	William J. Robinson
Judgment Debtor, Kiowa Tribe	Brown Wallace

Aquila Energy	Donna Blakley
The Home Stake Royalty Corp.	Peter Braford
Kerr-McGee Refining Corp.	Myron Cunningham
ORYX	Jonathan Peters
Plains Liquids	Dwight Birdwell
Sun Company, Inc., Associated Natural Gas, Inc. and Associated Transport and Trading Company	Robin Fields
Total Petroleum	Joseph L. Carnell

The Court finds:

1. The ruling on Plaintiff's Motion for Summary Judgment should be withheld pending the formal disposition of the appeals of Judgment Debtor in Supreme Court of Oklahoma Case #82,505, styled Aircraft Equipment Company v. Kiowa Tribe of Oklahoma and Watson Management Group, Inc., and in Supreme Court of Oklahoma Case # 85,272, styled Aircraft Equipment Company v. The Kiowa Tribe of Oklahoma;

2. The Motion to Dismiss of Judgment Debtor Kiowa Tribe should be overruled without prejudice to a refiling after the disposition in paragraph 1., above;

3. All of the Defendant oil companies should and are hereby ordered to pay into Court all monies currently being held and which may hereafter accrue derived from the imposition of a severance tax by the Kiowa Tribe against proceeds from the sale of oil, gas and other hydrocarbons produced from lands owned by the said Tribe or any of its members (whether same are being held voluntarily or

pursuant to garnishment in Case #CJ-92-10176 or are the subject of prior garnishments in this action);

Upon payment of the disputed funds into Court by the Defendant oil companies who are disinterested stakeholder, each of the Defendant oil companies should be and are hereby dismissed from this action and released from all liability regarding the disputed funds paid into Court. This dismissal is contingent upon the Defendant oil companies who are disinterested stakeholders continuing to pay into the Court the disputed funds which may hereafter accrue.

Certain Defendant oil companies/disinterested stakeholders have previously been ordered to interplead current and future disputed funds into Court and dismissed from the action. Their status remains unchanged as a result of this Order.

4. The Kiowa Tribe should be and is hereby enjoined from enforcing its laws insofar as said laws (1) create a lien, and a foreclosure right, upon any Defendant, a bond to assure payment of the severance tax, which may result from a non-payment of such taxes by reason of the payment of said taxes into Court as ordered herein;

5. The Plaintiff should be and is hereby restrained from garnishing in the hands of any said purchasers/Defendants any such severance taxes accruing until further Order of the Court;

6. The Clerk is to hold the said monies so paid into Court in an interest bearing account as in the statutes so providing until further Order of the Court; and,

7. Defendants, who are disinterested stakeholders who have sought to interplead the disputed funds into Court, are entitled to recover from their respective interpled funds their costs, including reasonable attorney's fees, incurred in interpleading the disputed funds into Court. A determination of the amount of reasonable fees recoverable by these Defendants is deferred until a later date.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED in accordance with the foregoing findings.

S/John M. Amick
JUDGE OF THE DISTRICT COURT

APPROVED:

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COMPANY

Supreme Court, U.S.
FILED
AUG 27 1997
CLERK

No. 97-216

In The
Supreme Court of the United States
October Term, 1996

THE KIOWA TRIBE OF OKLAHOMA
a federally recognized Indian Tribe,
Petitioner,

vs.

AIRCRAFT EQUIPMENT COMPANY
an Oklahoma Partnership, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Oklahoma Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT,
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August, 1997

QUESTIONS PRESENTED FOR REVIEW

1. Does the reachability of an indian tribe's severance (gross production) taxes, extracted from oil companies, by proceedings in aid of execution of a state court judgment against it contravene the exercise by it of its power to regulate its membership or its internal and social affairs?

2. Does the judgment of Respondent Aircraft Equipment Company have priority over an unfiled, unasserted purported lien?

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Text:

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STATEMENT OF THE CASE

Aircraft Equipment Company ("Aircraft") recovered a money judgment against The Kiowa Tribe of Oklahoma ("Kiowa" or "tribe") in the District Court of Oklahoma County, Oklahoma. The judgment was affirmed by the Oklahoma Supreme Court[1] and is now final.

The case at bar was instituted as a creditor's bill in aid of execution of the underlying judgment. The creditor's bill is in the nature of an equitable garnishment to reach money or property belonging to the judgment debtor in the hands of a third party and subject it to the satisfaction of the judgment[2].

The money in issue is an oil and gas severance tax imposed by Kiowa on *energy companies* which purchase oil, gas and other minerals from properties owned by Kiowa or its members. It is the functional equivalent on the gross production tax levied by the State of Oklahoma on *royalty owners* of non-indian land which is collected by energy companies purchasing oil, gas or other minerals therefrom and remitted to the state[3].

The decision of the district court did not adjudicate the existence or priority of the judgment creditor's execution vis-a-vis the purported lien of Kiowa. In this, it

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[1] 921 P.2d 359 (Okl. 1996)

[2] 12 O.S. §841

[3] 68 O.S. §§1001, 1007, and 1008.

should be noted that Kiowa did not attempt to foreclose the purported lien in this action but only sought recognition of its existence[4].

REASONS FOR DENYING THE WRIT
THE REVENUES OF AN INDIAN TRIBE MAY BE SUBJECTED TO PROCEEDINGS IN AID OF EXECUTION OF A STATE COURT MONEY JUDGMENT

Aircraft asserts that when two or more indians associate themselves for profit and speculation they are the functional analogue of a taxi-cab drivers union (or any other membership organization, incorporated or unincorporated) and may not be granted impunity (sovereign or otherwise) from the exercise of non-discriminatory state laws. The tribe desires to exempt revenues from garnishment. The theory is that it has immunity from state court action by reason of sovereignty.

The sovereign immunity sought by the tribe is more narrow than that desired by the tribe. *Santa Clara Pueblo, et al. v. Martinez*, 436 U.S. 49, 56 L.Ed.2d 106, 98 S.Ct. 1670, is most often cited for the proposition that an indian tribe cannot be sued unless it has waived sovereign immunity. Close examination, however, reveals that

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4 The pertinent portion of the Answer of the tribe herein is, "It is the Tribe's intent to enforce its law, up to and including foreclosure of its lien, if it does not receive its severance tax pursuant to its ordinance."

a female member of the Santa Clara Pueblo, a tribe, and her daughter brought the action for declaratory and injunctive relief against the tribe claiming an ordinance of the tribe denying tribal membership to the children of female tribe members who married outside the tribe, while extending membership to the children of male members who married outside the tribe, violated Title I of the Indian Civil Rights Act, 25 U.S.C.S. Section 1301-1303. The Court held that the action was barred by the sovereign immunity of indian tribes.

This is *not inconsistent* with the expressions of United States Supreme Court that indian tribes, while losing powers inconsistent with their dependent, domestic status, retain the powers over tribal membership and tribal lands[5].

It is interesting to note that the majority, in *Santa Clara*, supra, at page 56, acknowledged that while the tribes are "no longer 'possessed of the full attributes of sovereignity', they remain a 'separate people, with the power of regulating their internal and social relations,'" citing *United States v. Wheeler*, 435 U.S. 313, 55 L.Ed.2d 303, 98 S.Ct. 1079, where at page 323, the Court states:

> "We have recently said: 'Indian tribes are unique aggregations possessing attributes of sovereignty over both their *members* and their *territory* . . .'". (emphasis added)

---

5 *United States v. Wheeler*, infra.

Little note has been taken of the syllabus in *Martinez*, supra:

> "Indian tribes are distinct, independent political communities retaining their original natural right in matters of local self-government: although no *longer possessed of the full attributes of sovereignty*, they remain a separate people, with the power of regulating their *internal* and *social affairs*." (emphasis added)

Moreover, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 36 L.Ed.2d, 114, 119, 93 S.Ct. 1267, reasons:

> "But tribal activities conducted outside the reservation present different considerations. State authority over indians is yet more extensive over activities . . . not on any reservation. *Organized Village of Kake*, supra, at 75, 7 L.Ed.2d 573. Absent express federal law to the contrary, indians going beyond reservation boundaries have generally been held subject to non-discriminatory state laws otherwise applicable to all citizens of the State . . ."

In citing *Oklahoma Tax Commission v. Citizens Bank Pottawatomie Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991), the tribe ignores Justice Stevens' concurring opinion:

> "Nevertheless, I am not sure that the rule of tribal sovereign immunity extends to cases arising from a tribe's conduct of commercial activity outside its own territory."

Kiowa chose to venture in a business enterprise for profit. It must pay its debt. No membership or self-government is involved.

Any attempt to expand the rule of law of *Santa Clara Pueblo v. Martinez,* supra, and its progeny to matters other than *internal* and *social* affairs is inconsistent with other opinions involving extra-tribal, external, off-reservation business enterprises.

In *Rice v. Rehner,* 463 U.S. 713, L.Ed.2d. 961, 103 S.Ct. 3291, the United States Supreme Court stated, in part:

> ". . . our recent cases have established a 'trend . . . away from the idea of inherent indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-exemption.' . . . we have instead employed a pre-emption analysis that is informed by historical notions of tribal sovereignty, rather than determined by them."

Otherwise stated, if there is no immunity, there is nothing to waive. The claim here rises no higher than a claim of impunity.

Pursuing the *Rice v. Rehner,* supra, rationale it is reasonable to state:

"Indian tribes do not tax to exist and do not exist to tax."

The subjection of income, from whatever source derived, to non-discriminatory state laws (i.e., garnishment) cannot be said to infringe on tribal self-government. It does not interfere with the power of the tribe to regulate its *internal* and *social* affairs; *Martinez,* supra.

The enforcement of the underlying judgment against tribe's revenues derived from the imposition of a tax on

purchasers against the proceeds of oil and gas produced from property owned by individual indians poses no threat to the tribe's self-government and does not affect the tribe's assets on indian land. It is not an execution as may be proscribed by 28 U.S.C. Section 1602, et. seq. (referred to as the "Foreign Sovereign Immunities Act of 1975" which is confined to "foreign states" by definition).

The Opinion of Mr. Justice Frankfurter in *Organized Village of Kake v. Egan*, 369 U.S. 60, 7 L.Ed.2d 573, 82 S.Ct. 562 dealt, inter alia, with the power of the State (Alaska) to regulate off-reservation fishing by indians and is helpful in the analysis of the issue herein. Justice Franfurter, after analyzing the legislative history of the statehood bills[6] with respect to retention of federal power over indian lands stated:

> "As the United States spread westward, it became evident that there was no place where the indians could be forever isolated. In recognition of this fact the United States began to consider the indians less as foreign nations and more as a part of our country . . .
>
> The general notion drawn from Chief Justice Marshall's opinion in *Worcester v. Georgia*, (US) 6 Pet. 515, 561, 8 L.Ed. 483, 501; . . . that an indian reservation is a distinct nation within whose

---

6 The Court compared the Oklahoma "Statues" that provided that Indian lands should remain "subject to the jurisdiction, disposal and control of the United States." See: Art. 1, Sec. 3, Oklahoma Constitution.

> boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations. By 1880 the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law . . .

Concurrently, the influence of state law increased rather than decreased . . .

> During the 1940's several states were permitted to assert criminal jurisdiction . . .
>
> In 1953, Congress granted to several states full civil and criminal jurisdiction over indian reservations . . .
>
> The applicability of state law, we there said, depends upon "whether the state action infringed on the right of reservation indians to make their own laws and be ruled by them," 358 U.S., at 220 . . .
>
> But State regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in *Williams v. Lee.*"

The principles enunciated by the unanimous Court in *Kake*, supra, were extended to the right of a State (New Mexico) to impose a tax on the gross receipts of a ski resort owned and operated by an indian tribe off reservation. In *Mescalero Apache Tribe v. Jones*, supra, the Supreme Court stated:

> "But Tribal activities conducted outside the reservation present different considerations. "State au-

thority over Indians is yet more extensive over activities . . . not on any reservation." *Organized Village of Kake*, supra, at 75, 7 L.Ed.2d 573. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally [411 U.S. 149] been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. See, e.g., *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398, 20 L.Ed.2d 689, 88 S.Ct. 1725 (1968); *Organized Village of Kake*, supra, at 75-76, 7 L.Ed.2d 573; *Tulee v. Washington*, 315 U.S.681, 683, 86 L.Ed. 115, 62 S.Ct. 862, (1942); *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575, 72 L.Ed. 709, 48 S.Ct. 1075 (1896). That principle is a relevant to a State's tax laws as it is to state criminal laws, see *Ward v. Race Horse*, supra, at 516, 41 L.Ed. 244, and applies as much to tribal ski resorts as it does to fishing enterprises. See *Organized Village of Kake*, supra."

The Court, in *Jones*, supra discussed the "back drop" of the Indian Reorganization Act of 1934, stating:

"The Indian reorganization Act of 1934 neither requires nor counsels us to recognize this tribal business venture as a federal instrumentality. Congress itself felt it necessary to address the immunity question and to provide tax immunity to the extent it deemed desirable. There is, therefore, no statutory invitation to consider projects undertaken pursuant to the Act as federal instrumentalities generally and automatically immune from state taxation. Unquestionable, the Act reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment. It gave the Secretary of Interior power to create new reservations, and tribes were encouraged to revitalize their self-government through

the adoption of constitutions and bylaws and through the creation of chartered corporations, with power to conduct the business and economic affairs of the tribe. As was true in the case before us, a tribe taking advantage of the Act might generate substantial revenues for the education and the social and economic welfare of its people. So viewed, an enterprise such as the ski resort in this case serves a federal function with respect to the Government's role in Indian Affairs. But the "mere fact that property is used, among others, by the United States as an instrument for effecting its purpose does not relieve it from state taxation." *Choctaw, Oklahoma & Gulf R. Co. v. Mackey*, 256 U.S. 531, 536, 65 L.Ed. 1076, 41 S.Ct. 582 (1921) (Other citations omitted).

The intent and purpose of the Reorganization Act was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." . . . The Reorganization Act did not strip Indian tribes of their reservation lands of their historic immunity from state and local control. But, in the context of the Reorganization Act, we think it unrealistic to conclude that Congress conceived of off-reservation tribal enterprises "virtually as an arm of the Government" . . . on the contrary, the aim was to disentangle the tribes from the official bureaucracy. The Court's decision in *Organized Village of Kake*, supra, which involved tribes organized under the Reorganization Act, demonstrates that off-reservation activities are within the reach of state law . . . What was said in *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 5675, 72 L.Ed. 709, 48 S.Ct. 333 (1928), is relevant here. At issue there was the taxability of off reservation Indian land purchased with consent of the Secretary of Interior

with the accumulated royalties from the individual Indian's restricted allotted lands. Alienation of the purchased lands was federally restricted. In rejecting a claim that state taxation of the land was barred by the federal-instrumentality doctrine, the then Mr. Justice Stone wrote for a unanimous Court:

"What governmental instrumentalities will be held free from state taxation, though Congress has not expressly so provided, cannot be determined apart from the purpose and character of the legislation creating them . . .

"The early legislation affecting the Indians had as its immediate object the closest control by the government of their lives and property. The first and principal need then was that they should be shielded alike from their own improvidence and the spoilation of others but the ultimate purpose was to give them the more independent and responsible status of citizens and property owners . . .

In a broad sense all land which the Indians are permitted to purchase out of the taxable lands of the state in this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instrumentalities of that process. But . . . [t]o hold them immune would be inconsistent with one of the [411 U.S.155] very purposes of their creation, to educate the Indians in responsibility . . ."

We accordingly decline the invitation to resurrect the expansive version of the intergovernmental-immunity doctrine that has been so consistently rejected in modern times.

The Tribe's broad claims of tax immunity must therefore be rejected. But, there remains to be

> considered the scope of the immunity specifically afforded by §5 of the Indian Reorganization Act. 25 U.S.C. §465 . . [25 U.S.C.S. §465].
>
> But, absent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax.
>
> This Court has repeatedly said that tax exemptions are not granted by implication . . . It has applied that rule to taxing acts affecting Indians as to all other . . . If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inference. *Oklahoma Tax Comm'n v. United States*, 319 U.S., at 606-607, 87 L.Ed. 1612 . . . Here, the rights and land were acquired by the Tribe beyond its reservation borders for the purpose of carrying on a business enterprise as anticipated by §476 and 477 of the Act. These provisions are designed to encourage tribal enterprises "to enter the white world on a footing of equal competition" . . . . . In this context, we will not imply an expansive immunity from ordinary income taxes that businesses throughout the State are subject to. We therefore [411 U.S. 158] hold that the exemption in §465 does not encompass or bar the collection of New Mexico's nondiscriminatory Gross Receipts Tax and that the Tribe's ski resort is subject to that tax . . ."

What has been said with respect to a non-discriminatory state tax above can be said with respect to a non-discriminatory proceeding in aid of execution of a state court money Judgment.

NEITHER THE STATE OF OKLAHOMA NOR THE UNITED STATES OF AMERICA IS IMMUNE FROM THE PAYMENT OF ITS DEBT

The rationale requiring the State of Oklahoma to pay its debts is equally applicable to the tribe in the case at bar.

In *Lawrence v. Patton*, 710 P.2d 108 (Okl. 1985), the Oklahoma Supreme Court relaxed the doctrine of a *state's sovereign* immunity in actions based on contract, even without a valid appropriation to fund the contract entered into by the state.

Further, in *State Bd. of Pub. Affairs v. Principal Funding Corp.*, Okla. 542 P.2d 503, the court stated:

"We find no justifiable reason why the State should secure to itself the benefits of a contract without assuming the corresponding liabilities. In our opinion the doctrine of sovereign immunity should not be applicable in cases where State has entered into a valid contract and an individual or entity seeks redress for breach of the State's contractual obligations."

Notwithstanding, there is no "Indian Country", reservation, allotment or royalty, bonuses, rents or tribal members' income involved.

The severance tax is not a gross receipt derived by the United States from any contract which might be otherwise exempt under any law, e.g., 25 U.S.C. §459d(b). If a state may reach gross receipts of a ski resort off-reservation

(Mescalero Apache Tribe v. Jones, supra) there is no rationale for exempting monies owing to a tribe by oil companies derived from "off-reservation" activities from the exercise of state court proceedings in aid of execution of a state court money judgment.

The revenue enjoys no more protection than the income of any commercial enterprise.

The court's attention is invited to *United States Petitioner v. Winstar Corporation, et al.,* 135 L.Ed.2d 964, 116 S.Ct. 2432, _____ U.S. _____. The issue was the enforceability of contracts between the government (U.S.) and participants in a regulated industry.

The plurity stated:

> "We took this case to consider the extent to which special rules, not generally applicable to private contracts, governing the enforcement of governmental contracts at issue here. We decide whether the government may assert for special defenses to respondents' claims for breach: the canon of contract construction that surrenders of sovereign authority must appear in unmistakable terms, *Bowen v. Public Agencies Opposed to Social Security Entrapment,* 477 U.S. 41, 52 (1986); the rule that an agents authority to make such surrenders must be delegated in express terms, *Home Telephone & Telegraph Co. v. City of Los Angeles,* 211 U.S. 265 (1908); the doctrine that a government may not, in any event, contract to surrender certain reserved powers, *Stone v. Mississippi,* 101 U.S. 814 (1880); and finally, the principle that a Government's sovereign acts do not give rise to a claim for breach of

> contract, *Horowitz v. United States*, 267 U.S. 458, 460 (1925)."

This honorable court concluded that the government is liable for breach of contract, notwithstanding sovereign immunity. Aircraft urges upon the court the principles enunciated in footnote 39 *of Winstar* from *United States v. Bostwick*, 94 U.S. 53, 66 (1877):

> "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizens in that behalf,"

and *Cooke v. United States*, 91 U.S. 389, 398, explaining that when the United States

> ". . . comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there."

The Respondent asserts that, by analogy, there is no "immunity" of which the Petitioner has been deprived and the payment of the judgment would not contravene Kiowa's regulation of its membership or social and internal affairs.

THE PURPORTED LIEN OF TAX AGAINST APPELLEE OIL COMPANIES HAS NOT BEEN VITIATED BY THE EQUITABLE GARNISHMENT

The decision of the district court did not adjudicate the priority of the judgment creditor's execution vis-a-vis the purported lien of the tribe. In this, it should be

noted that the tribe did not attempt to foreclose the purported lien in this action but only sought the recognition of its existence.

The "injunction", "restraining the tribe from enforcing its lien against the defendant oil companies herein" merely held in abeyance the recognition of the priority of the proceedings in aid of execution (creditor's bill) over any attempt by the tribe to exercise whatever rights it possessed under its ordinance.

The subjection of the revenues derived from taxing oil companies to the satisfaction of the judgment does not vitiate or invalidate the purported lien nor does interfere with tribal self-government.

There is a clear analogy here to what has been said in *Mescalero Apache Tribe v. Jones*, supra, with respect to taxation by New Mexico of off-reservation revenues. The United States Supreme Court, in *Jones*, supra, said in pertinent part:

> "Here, the rights and land were acquired by the Tribe beyond its reservation borders for the purpose of carrying on a business enterprise . . . These provisions are designed to encourage tribal enterprises 'to enter the white world on a footing of equal competition' . . . In this context, we will not imply an expansive immunity from ordinary income taxes that businesses throughout the State are subject to . . ."

The right of the tribe to tax, while a "necessary instrument of self-government and territorial management",

does not excuse or exempt the tribe from the application to it of non-discriminatory state laws subjecting its off-reservation income, from whatever source derived (levies or enterprise income) to the payment of its debts.

There is no historical backdrop of immunization for such revenues. There is no federal pre-emption affecting such revenues. The tribe and Aircraft are on equal footing.

THE AUTHORITIES CITED BY APPELLANT DO NOT WARRANT THE RELIEF SOUGHT

Merrion v. Jicarilla Apache Tribe, 455, U.S. 130, 71 L.Ed.2d 21, 102 S.Ct. 894.

The contest was over severance taxes imposed on oil and natural gas severed, saved and removed from the Jicarilla Apache Tribe *reservation* in northwestern New Mexico. Two characteristics distinguish this case from the case at bar: first, the on/off reservation dichotomy and second, the Jicarilla tribe is organized under the Indian Reorganization Act of 1934, Ch. 596, 48 Stat. 984, 25 U.S.C. §461 et seq. Neither characteristic are akin to the tribe herein. Nevertheless, that case merely permits the imposition of the severance tax for extraction *on* reservation.

The decision in *Jicarilla*, supra, is not authority for exempting such revenues from the payment of the tribe's

debt.

Of significance is the recent case of *Oklahoma Tax Commission v. Chickasaw Nation*, 115 S.Ct. 2214 (1995). The U.S. Supreme Court permitted Oklahoma to tax the wages that (1) the Tribe pays (2) to members of the Tribe (3) who work for the Tribe (4) within Inidan country, but (5) who live outside Indian country, and, apparently commute to work.

The significance is *only* to point out that:

> "Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State"; *Mescalero Apache Tribe v. Jones*, supra.

The revenues sought to be subjected to the proceedings in aid of execution are not derived from *on* reservation activities.

IF A CONFLICT BETWEEN JURISDICTIONS EXISTS, IT IS THE CONFLICT OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT WITH THIS COURT'S JURISPRUDENCE ON THE AMENABILITY OF AN INDIAN TRIBE TO STATE COURT JURISDICTION

The United States Supreme Court has reviewed the tradition of sovereignty and Mr. Justice Rhenquist found that no immunity for off-reservation activities had traditionally been recognized (concurring in part and dis-

cases have recognized that tribal sovereignty contains a 'significant geographical component,' " citing *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 65 L.Ed.2d 665.

THE DOCTRINE OF INDIAN SOVEREIGN IMMUNITY DOES NOT INSULATE A TRIBE FROM THE EXERCISE OF NON-DISCRIMINATORY STATE COURT JURISDICTION TO ENFORCE A STATE COURT MONEY JUDGMENT AGAINST IT

The case of *Little Horn State Bank v. Stops,* (Montana 1976, 555 P.2d 211, cert. denied, 431 U.S. 924, 97 S.Ct. 2198, 53 L.Ed.2d 238) supports the foregoing Proposition. The court stated:

> "Respondents, members of the Crow Indian Tribe residing on the Crow Indian Reservation, obtained a loan from appellant bank located in Hardin, Montana, and failed to repay the loan. This commercial transaction took place at the bank *which is located outside the exterior boundaries of the Crow Indian Reservation.* Process was served upon respondents on the reservation. Thereafter appellant obtained a judgment in the district court of the thirteenth judicial district in the amount of $3,541.24. Following this judgment on February 18, 1976, execution was issued by the district court on February 23, 1976. The writ of execution was directed to the sheriff of Big Horn County, who proceeded to garnish the wages of respondents earned on the reservation but within Big Horn County. Respondents sought and obtained injunctive relief against

the writ of execution. Appellant seeks to dissolve the permanent injunction and be allowed to levy upon the respondents' property and wages within the reservation.

Respondents did not attack the district court's subject matter jurisdiction or personal jurisdiction at the district court level or before this Court. Both of these issues have been laid to rest by *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 147-148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114, 119, and *Bad Horse v. Bad Horse*, 163 Mont. 445, 517 P.2d 893, cert. den. 419 U.S. 847, 95 S.Ct. 83, 42 L.Ed2d 76.

A review of the district court's jurisdiction had no Indian jurisdictional dispute been involved, is useful to this decision. It has been a long standing doctrine that any court having jurisdiction to render a judgment also has the power to enforce that judgment through any order or writ necessary to carry its judgment into effect. *U.S. ex rel. Riggs v. Johnson County*, 6 Wall. 166, 18 L.Ed. 768 (1868); *Pam-to-Pee v. United States*, 187 U.S. 371, 23 S.Ct. 142, 47 L.Ed. 221 (1902); *Hamilton v. Nakai*, 453 F.2d 152, cert. den. 406 U.S. 945, 92 S.Ct. 2044, 32 L.Ed.2d 332.

The United States Supreme Court defined "jurisdiction" 6 Wall. 166, 18 L.Ed. at P. 773 in *Riggs:*

> . . . Jurisdiction is defined to be the power to hear and determine the subject matter in controversy in the suit before the court, and *the rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree . . .* ***

Express determination of this court is that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that

judgment shall be satisfied. ***"

The *Stops*, supra, court held that state action, in the form of a writ of execution to enforce a judgment rendered on a transaction arising outside an indian reservation, does not interfere with the tribe's right to make its own rules and be governed by them; and that a writ of execution from a state court is valid within an indian reservation when such is a means of enforcing a valid judgment of that court. The United States Supreme Court denied certiorari.

CONCLUSION

For reasons cited above, the writ of certiorari should be denied.

Respectfully submitted:

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No. 97-216

In The

Supreme Court of the United States

October Term, 1997

THE KIOWA TRIBE OF OKLAHOMA
a federally recognized Indian Tribe,

Petitioner,

vs.

AIRCRAFT EQUIPMENT COMPANY
an Oklahoma Partnership, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Oklahoma Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an injunction in support of interpleader, entered in an action to enforce against an Indian tribe a judgment valid on its face, which was rendered on a transaction arising outside of Indian Country, interferes with the tribe's right to make its own rules and be governed by them.

PARENTS/SUBSIDIARIES OF CORPORATE RESPONDENTS

The parent and/or subsidiaries of each of these Respondents are:

Respondent, Aquila Energy Corporation:

UtiliCorp. United, Inc.
Aquila Gas Pipeline Corporation

Respondent, The Home-Stake Royalty Corporation:

The Home-Stake Royalties, Ltd.
The Home-Stake Gas Corporation

Respondent, Sun Company, Inc. (R&M):

Sun Company, Inc.

Respondent, Associated Natural Gas, Inc. (now Duke Energy Field Services, Inc., formerly PanEnergy Field Services, Inc.):

Duke Energy Natural Gas Corporation
(formerly PanEnergy Natural
Gas Corporation)
AIM Pipeline Company
ANGI Gas Services Company
Associated Louisiana Intrastate
Pipeline Company
Associated Storage Corporation
Centana Gathering Company
Centana Oil Gathering Company
Centana Intrastate Pipeline Company
PanEnergy Comite Company
Grand Valley Gas Canada, Ltd.
GV Power Corporation II
National Helium Corporation

PARENTS/SUBSIDIARIES OF CORPORATE RESPONDENTS – Continued

PanEnergy Dauphin Island Company
PanEnergy Financial Services, Inc.
PanEnergy Intrastate Pipeline Company
PanEnergy Louisiana Corporation
PanEnergy Louisiana Intrastate Company
PanEnergy Marketing Company
PanEnergy Mobile Bay Processing Company
PanEnergy NGL Services, Inc.
PanEnergy Texas Gathering Company
PanEnergy Texas Intrastate Pipeline Company

Respondent, Associated Transport and Trading Company (now Duke Energy Transport and Trading Company, formerly PanEnergy Transport and Trading Company):

Duke Energy Natural Gas Corporation (formerly PanEnergy Natural Gas Corporation)
Lubrication Services, Inc.
Duke Energy Pipe Line Company

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Aquila Energy Corporation, The Home-Stake Royalty Corporation, Sun Company, Inc. (R&M), Associated Natural Gas, Inc., Associated Transport and Trading Company and Kerr-McGee Refining Corporation (referred to herein collectively as "the Purchasers"), respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Oklahoma Supreme Court's opinion in this case.

STATUTORY PROVISIONS INVOLVED

Okla. Stat. tit. 12, § 2022 (1991), is the Oklahoma statute upon which the Purchasers, as disinterested stakeholders, were permitted to deliver the funds in question to the court by way of interpleader. That statute provides in pertinent part:

> A. Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. . . . A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. . . .
>
> * * *
>
> C. The court may make an order for the safekeeping of the subject of the action or for its payment or delivery into the court. . . . Where the party seeking relief by way of interpleader claims no interest in the subject of the action and the subject of the action has been deposited

> with the court . . . , the court should discharge him from the action and from liability as to the claims of the other parties to the action with costs and, in the discretion of the court, a reasonable attorney fee.

STATEMENT OF THE CASE

Introduction. Petitioner, Kiowa Tribe of Oklahoma (the "Tribe"), makes several statements in its Petition for Writ of Certiorari that are not supported by the record in this case. The Tribe asserts these facts to support its claim that the collection remedies provided to Respondent Aircraft Equipment Company ("Aircraft"), and the interpleader remedy provided to the Purchasers in this case interfere with the Tribe's right to self government and self-determination.

However, these facts were neither presented to nor considered by the Oklahoma Supreme Court in reaching its decision in this case. The record in this case is limited and very few facts were presented to the Oklahoma Supreme Court. *See* Kiowa's Brief in Chief, Appendix 5-8.[1] The focus of the Tribe's briefs before the Oklahoma Supreme Court was its argument that Aircraft's action to enforce the prior judgment violated the Tribe's sovereign

[1] In accordance with its normal practice, the Oklahoma Supreme Court decided the appeal based on the briefs submitted by the parties. Any issues not addressed in an appellant's brief are deemed waived. *Hadnot v. Shaw*, 826 P.2d 978, 981 (Okla. 1992).

immunity for the same reason that the entry of the underlying judgment in the prior lawsuit violated the Tribe's right to sovereign immunity. The Tribe did not assert any additional authorities to support its argument that the enforcement remedies interfered with its right of taxation or self-government, as pointed out by the Oklahoma Supreme Court in its opinion. (Opinion, ¶¶ 9, 10, Petitioner's Appendix 10-11).

Trial court proceedings. Aircraft filed this case seeking equitable relief in the nature of a creditor's bill to satisfy a money judgment against the Tribe that was entered in a prior lawsuit. The underlying money judgment was a result of a breach of a contract between the Tribe and a non-Indian, executed outside of Indian Country. That contract was not attached to any pleading, nor was it introduced into evidence or otherwise made a part of the record in this case.

The judgment in the prior lawsuit was affirmed while the appeal in this case was pending before the Oklahoma Supreme Court. *Aircraft Equipment Company v. Kiowa Tribe of Oklahoma*, 921 P.2d 359 (Okla. 1996) ("*Aircraft I*"). The Tribe did not challenge the Oklahoma Supreme Court's opinion in *Aircraft I* by way of *certiorari*, and the underlying money judgment is now a final judgment.

Aircraft brought this lawsuit against the Tribe, Watson Management Group, Inc. ("Watson"), and certain oil and gas entities that purchased oil and gas produced from Kiowa lands and remitted severance taxes on such production to the Tribe, including the Purchasers. (Petition and Amended Petition, R. 1, 21). Watson collected severance taxes under a contract with the Tribe, under

which Watson was paid 50% of the amount of the taxes collected. (Petition, ¶4, R. 1; Answer ¶4, R. 125). Aircraft alleged that it was entitled to enforce its judgment by collecting severance taxes directly from the Purchasers, in priority over the claim of either Watson or the Tribe.

The Tribe asserted sovereign immunity and challenged the trial court's power to entertain Aircraft's suit. Because of the conflicting claims, the Purchasers, as disinterested stakeholders, sought to interplead the disputed severance taxes into court on a continuing monthly basis until final resolution of the dispute between Aircraft and the Tribe, pursuant to Okla. Stat. tit. 12, § 2022. (R. 158-163, 164-167, 177-179, 210-215, 216-219, 281-285, 286-288, 355-359, 360-364).

There is no support in the record for the Tribe's statement that this action involves "all of the oil and gas severance taxes imposed by Kiowa upon those who produce oil and gas from Kiowa Indian Country." (Petition for a Writ of Certiorari at 4). In Aircraft's Petition, cited by the Tribe, and in its Amended Petition, Aircraft sought relief only with respect to the severance taxes remitted by the named oil and gas entities. (R. 1, 21). Nor is there any support in the record for the Tribe's statement that its tribal functions were "reduced or eliminated." (Petition for a Writ of Certiorari at 12). With respect to the Tribe's statement that its severance taxes comprise about one-third of the Tribe's *tax* revenues, there is no evidence in this case of how much of that one-third is comprised of the severance taxes remitted by the oil and gas entities named in this case. Moreover, there is no evidence showing how much of the Tribe's *total* revenues are comprised of the Tribe's *tax* revenues.

Contrary to the Tribe's statement at page 5 of its Petition, the oil and gas entities that were sued are not production companies who owed the severance taxes.[2] Nor did the Tribe assert that payment of the severance taxes to the court or Aircraft constituted a failure to pay the tax or seek foreclosure of a resulting tax lien.[3]

By order filed July 5, 1995, the trial court granted the Purchasers' request to interplead the severance taxes into court, restrained the Tribe and Aircraft from taking any action against the Purchasers relating to the severance taxes paid into court, and dismissed the Purchasers from the action. (Order, R. 409-421.) On October 13, 1995, the court entered judgment finding that Aircraft was entitled

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[2] Under the Tribe's laws, producers of the oil and gas were liable for the severance taxes and the Tribe had the right to impose a tax lien upon the producers' oil and gas leasehold estate if the severance taxes were not paid. However, purchasers of the production were authorized to remit the taxes to the Tribe on behalf of the producers. (Tribe's Answer at 2, ¶ 2, R. 125).

[3] The Tribe alleged in its answer to the petition that the producers were necessary parties because their interests in the oil and gas leasehold estates were subject to a tax lien and foreclosure. *Id.* at 4, ¶ 5, R. 125. The Tribe did not pursue its claim that the producers should be joined. The Tribe's laws, however, provide that monetary and other penalties can be imposed upon purchasers for late payments of the severance tax, and provided a mechanism by which the Tribe could perfect a lien against the producer's share of oil and gas produced and the proceeds thereof, including the production and proceeds in the hands of purchasers. (*See* Tribe's laws attached to Amended Answer, R. 188). The Tribe did not seek to perfect or foreclose any such lien in this case.

to recover the disputed severance taxes to satisfy Aircraft's judgment in *Aircraft I*. However, the court provided that the severance taxes due from the Purchasers should be paid into court, rather than to Aircraft, until further order of the court. The court further ordered that the Tribe should be restrained from enforcing any lien against the Purchasers with respect to the severance taxes which were paid into court. (Journal Entry of Judgment, R. III-129-III 152).

The appeals from the judgment and order. Aircraft filed an appeal, challenging the portion of the judgment granting interpleader.[4] The Tribe also filed an appeal from the judgment, asserting that the trial court did not have the authority to enforce the underlying judgment for the same reasons that it did not have the authority to enter the underlying judgment. The Tribe did not challenge the Purchasers' right to file an interpleader action or the court's jurisdiction to preside over such interpleader action. A review of the Tribe's Brief in Chief reveals that the only challenge to the court's jurisdiction was the court's "power over damage suits or a suit to enforce damage judgments." (Appendix 8). In fact, in responding to Aircraft's brief, challenging the interpleader, the Tribe stated:

> The oil company defendants found themselves, on the one hand, subject to a possible court

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[4] Aircraft's appeal was docketed in Case No. 85,975, and characterized by the Oklahoma Supreme Court as a cross-appeal. (Opinion, ¶ 12, Petitioner's Appendix 12). The issue was resolved on appeal in favor of the Purchasers. *Id.*

> order directing them to pay Kiowa's tax revenues to Aircraft, and, on the other hand, facing Kiowa's assertion that such an order was jurisdictionally void, and Kiowa would foreclose its tax liens upon the oil companies' oil and gas leases. *Understandably, the oil companies interplead the tax revenues and asked to be relieved from further proceedings.*

(Appendix 29, emphasis added).

The Oklahoma Supreme Court affirmed the order granting interpleader and the judgment.

REASONS FOR DENYING CERTIORARI

I. THE DISTRICT COURT HAS THE POWER TO ENFORCE ITS JUDGMENT AGAINST THE TRIBE.

It has long been held that a court's power to render a judgment includes the power to enforce its judgment. *U.S. ex rel Riggs v. Board of Supervisors of Johnson County, Iowa*, 73 U.S. 166, 6 Wall. 166, 18 L. Ed. 768 (1867); *Little Horn State Bank v. Stops*, 170 Mont. 510, 555 P.2d 211 (1976), *cert. denied*, 431 U.S. 924, 97 S. Ct. 2198, 53 L. Ed. 2d 238 (1977). The case of *Little Horn State Bank* involved facts similar to the instant case. In that case, a bank obtained a judgment against the Indian defendants. The state district court found that the plaintiff bank could not execute on the Indian defendants' property, located on the reservation, in order to satisfy its judgment. The bank appealed. On appeal, the Montana Supreme Court framed the issue based on this Court's pronouncement in

Williams v. Lee, 358 U.S. 217, 220, 79 S. Ct. 269, 271, 3 L. Ed. 2d 251, 254 (1959), wherein the Court stated:

> Essentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

The question presented in *Little Horn State Bank* was virtually identical to that presented in this case:

> [W]hether state action, in the form of a writ of execution to enforce a judgment rendered on a transaction arising outside the reservation, interferes with the tribe's right to make its own rules and be governed by them.

Little Horn State Bank, 555 P.2d at 213. The court held the enforcement of the bank's judgment did not interfere with the tribe's right of self-government.

The court said that the tribe provided no means of enforcing the state court judgment and was not subject to the full faith and credit clause, as are sister states. Consequently:

> Until the Crow Tribe has provided a means of such enforcement or acted in some manner within this area, we fail to see how tribal self-government is interfered with by assuming that reservation Indians pay for their debts incurred off the reservation.

Little Horn State Bank, 555 P.2d at 214. The court pointed out that the defendant tribal members elected to leave the reservation and conduct their affairs within the jurisdiction of the state courts. By doing so, they submitted themselves to the laws of the state. They could not violate

those laws and then retreat to the sanctuary of the reservation for protection. The court rejected the authorities cited by the Indian defendants because this was not a case of a non-member choosing to transact his business within the boundaries of the Indian reservation, as in *Williams v. Lee, supra,* or *Kennerly v. District Court of Montana,* 400 U.S. 423, 91 S. Ct. 480, 27 L. Ed. 2d 507 (1971).[5]

The court relied on this Court's holding in *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148, 93 S. Ct. 1267, 1270, 36 L. Ed. 2d 114, 119 (1973), wherein the Court said:

> Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the state.

The court found the Indian defendants went beyond the boundaries of the Crow Indian Reservation and that the execution statutes were nondiscriminatory and otherwise applicable to all citizens of the state. The court said the appeal essentially boiled down to whether the jurisdiction granted in *Mescalero* is the same as that defined by the United States Supreme Court in *Riggs,* 73 U.S. at 166 and *Pam-To-Pee v. U.S.,* 187 U.S. 371, 23 S. Ct. 142, 47 L.

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[5] In its Petition, the Tribe has also erroneously relied upon cases *not* involving a tribal member's transaction of business outside of Indian country. *See, e.g., Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982); *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987).

Ed. 221 (1902), or whether it was merely the opportunity to render a judgment incapable of enforcement. The court said the latter would be absurd and quoted from this Court's decision in *Pam-to-Pee*, wherein the Court stated:

> The award of execution is a part, and an essential part of every judgment passed on by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties.

Pam-To-Pee, 187 U.S. at 383. To avoid such an illogical situation, the court held that a writ of execution from the state court was valid within the Indian reservation when such was a means of enforcing a valid judgment of that court. The court pointed out that individual rights, due process, impartial and effective maintenance of justice, and the public confidence in and respect for the courts is paramount in the resolution of these kinds of matters. The citizens of the state would be grossly deprived if, under the guise of individual due process, they not only had no speedy, adequate, remedy, but no remedy at all.

As stated by the Montana Supreme Court in *Little Horn State Bank*, its decision in that case is supported by the holdings of this Court. This Court has held that, absent express federal law to the contrary, Indians going beyond reservation boundaries are subject to non-discriminatory state law otherwise applicable to all citizens of the state. *Mescalero Apache Tribe v. Jones*, 411 U.S.

at 148-49, 36 L. Ed. 2d at 119; *Organized Village of Kake v. Egan*, 369 U.S. 60, 72, 82 S. Ct. 562, 7 L. Ed. 2d 573, 582 (1962). The Court has declared that state laws may be applied to Indians going beyond reservation boundaries, unless such application would interfere with the reservation's self-government or impair a right granted or reserved by federal law. *Organized Village of Kake*, 369 U.S. at 75.

II. AN INJUNCTION, RENDERED UNDER NON-DISCRIMINATORY STATE LAW, WHICH WILL REMAIN IN EFFECT ONLY UNTIL THE JURISDICTIONAL ISSUE RAISED BY THE TRIBE IS FINALLY DECIDED, IS PROPER.

The Tribe relied in this case on a stipulation entered into in a prior lawsuit by Aircraft that severance taxes collected by the Tribe make up about one-third of the Tribe's total tax revenue and these tax revenues are used for various enumerated governmental functions.[6] The Purchasers were not parties to this stipulation. Nevertheless, the record does not reflect what percentage of the Tribe's tax revenues make up the Tribe's total revenues – .000001%, 1%, 10%? Moreover, there is no support in the record that governmental functions of the Tribe were reduced or eliminated as a result of the severance taxes owed by the Purchasers being paid into court.

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[6] Contrary to the Tribe's assertion, the stipulation does *not* provide that the severance taxes collected *from the Respondent oil and gas entities* make up one-third of the Tribe's total tax revenues. There is no support in the record for the Tribe's statement that the targeted tax revenue is all of the oil and gas severance taxes imposed by the Tribe.

The court's injunction in this case was part and parcel of the Purchasers' request to interplead the severance taxes into court. Oklahoma's interpleader statute, Okla. Stat. tit. 12, § 2022, upon which the court relied to grant interpleader in this case, is based on Fed. R. Civ. P. 22,[7] which is based on the following principle:

> The principle of interpleader is that, where two persons are engaged in a dispute, and that which is to be the fruit of the dispute is in the hands of a third party, who is willing to give up according to the result of the dispute, then, . . . that third person . . . is not to be obliged to be at the expense and risk of defending an action, but, on giving up the thing . . . , he is to be relieved, and the Court directs that the persons between whom the dispute really exists shall fight it out at their own expense. The mere statement of the principle shows its justice.

C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1702 at 493 (1986), *citing Evans v. Wright*, 13 W. R. 468 (C. P. 1865). Essentially, interpleader forces the claimants to contest what essentially is a controversy between them without embroiling the disinterested stakeholder in the litigation over the merits of their respective claims. *Cramer v. Phoenix Mut. Life Ins. Co.*, 91 F.2d 141 (8th Cir. 1937), *cert. denied*, 302 U.S. 739, 58 S. Ct. 141, 82 L. Ed. 571 (1937).

Injunctive relief may be entered in an interpleader action and is recognized as being especially proper in interpleader. *Holcomb v. Aetna Life Insurance Co.*, 228 F.2d

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[7] Oklahoma Committee Comment to § 2022.

75, 82-83 (10th Cir. 1955), *cert. denied*, 350 U.S. 986, 76 S. Ct. 473, 100 L. Ed. 853 (1956); *U.S. v. Major Oil Corp.*, 583 F.2d 1152 (10th Cir. 1978). In *Consolidation Co. v. Bailey*, 330 F. Supp. 474, 478 (W.D. Pa. 1971), *affirmed*, 467 F.2d 1124 (3rd Cir. 1972), *cert. denied*, 410 U.S. 930, 93 S. Ct. 1372, 35 L. Ed. 2d 592 (1973), the court held that affirmative injunctive relief is part and parcel of an interpleader action, stating that "any injunctions issued against suits with respect to the fund are simply ancillary or incidental to the disposition of the fund and merely have the purpose of enforcing the distribution made by the court." Thus, affirmative, injunctive relief is expected, proper and fully within the power of the court in an interpleader action, part and parcel of actions brought for the preservation of a fund for the benefit of others. The very purpose of an interpleader action is the preservation of the fund and it would be illogical and self-defeating for a court not to grant injunctive relief. *Id.*

The injunction issued in this case is to remain in effect until the jurisdictional issue raised by the Tribe is finally determined. Interpleader and the accompanying injunction was issued pursuant to nondiscriminatory Oklahoma state law to protect all parties in the action, including the Tribe. By allowing the Purchasers to interplead the disputed funds until the jurisdictional issue is finally determined, the funds are not paid over to Aircraft (per the court's judgment) and there is no risk of the Tribe not being able to recover the funds if it should finally prevail on the jurisdictional issue.

Injunctions have previously been granted against Indians in cases in order to prevent irreparable injury. *See, e.g., United States v. State of Oregon*, 657 F.2d 1009 (9th

Cir. 1981) (preliminary injunction restricting on-reservation fishing by Indian tribe); *United States v. Hosteen Tse-Kesi*, 191 F.2d 518 (10th Cir. 1951) (Navajo Indians enjoined from repeated and continuing trespasses on lands of the United States; *UNC Resources, Inc. v. Benally*, 518 F. Supp. 1046 (D.C. Ariz. 1981), (preliminary injunction barring the Navajo Tribal Court from exercising jurisdiction until the district court determined whether it or the tribal court had jurisdiction over an Indian plaintiff's civil suit against a non-Indian defendant which arose out of allegedly tortious conduct occurring off the reservation).

In this case, interpleader and the accompanying injunction were granted pursuant to nondiscriminatory Oklahoma state law. The injunction will remain in effect only until the jurisdictional issue raised by the Tribe is finally decided. The court's order directing the Purchasers to pay severance taxes owed to the Tribe into court, and enjoining the parties from taking any action against the Purchasers to collect the severance taxes being paid into court, does not interfere with the Tribe's right to self-government.

III. THE TRIBE'S ATTEMPT TO COLLATERALLY ATTACK THE UNDERLYING JUDGMENT SOUGHT TO BE ENFORCED IN THIS ACTION IS IMPERMISSIBLE.

The Tribe attempts to support its Petition by including facts not supported by the record and by going behind the state district court's judgment, rendered on Aircraft's petition for equitable garnishment, to attack the

underlying judgment sought to be enforced. The Tribe did not seek review by this Court of the Oklahoma Supreme Court's decision on the underlying judgment, and the underlying judgment is final. *See Aircraft I.* The Tribe's collateral attack on the underlying judgment is impermissible. A collateral attack is an attempt to avoid, defeat, or evade a judgment, or to deny its force and effect, in an incidental proceeding not provided by law for the express purpose of attacking it. *Trustees of Somerset Academy v. Picher,* 90 F.2d 741, 744 (lst Cir. 1937), *cert. denied,* 302 U.S. 737, 58 S. Ct. 139, 82 L. Ed. 570 (1937). In the case of a collateral attack on a domestic judgment of a court of general jurisdiction, every reasonable presumption shall be indulged in support of the regularity and validity of the judgment, and, unless the contrary affirmatively appears from the face of the record, it generally will be presumed that the court had jurisdiction of the subject matter and of the parties, and that facts existed which were necessary to give the court jurisdiction or power to render the particular judgment. *Cook v. Cook,* 342 U.S. 126, 128-29, 72 S. Ct. 157, 159-60, 96 L. Ed. 146 (1951); *Pettit v. American Nat. Bank of Austin,* 649 P.2d 525, 529 (Okla. 1982).

The record in this matter does not include the assumption agreement which was the basis for imposing liability on the Tribe in the underlying action. If the Tribe waived sovereign immunity in the agreement, such waiver will be effective here to bar the Tribe's assertion of sovereign immunity. *See, e.g., Oklahoma Tax Commission v. Citizens Band Pottawatomie Indian Tribe,* 498 U.S. 505, 509, 111 S. Ct. 905, 909, 112 L. Ed. 2d 1112, 1119 (1991) (acknowledging the tribe's ability to waive sovereign

immunity). Moreover, the face of the Oklahoma Supreme Court's opinion in *Aircraft I*, does not affirmatively show that the court did not have jurisdiction over the Tribe in the underlying action. Absent some affirmative evidence of the assumption agreement, which was the basis for finding liability against the Tribe in the underlying action, or some other evidence, it must be presumed that the district court had jurisdiction over the Tribe in the underlying action. Collateral attack of the now final judgment is therefore impermissible.

In an analogous case decided under Oklahoma law, the court held that land owned by a full-blooded Indian was subject to a levy on execution as unrestricted land where the state district court had previously determined the land was free of restrictions, and no appeal was taken from the court's adjudication. *Barnett v. Newcomer*, 307 P.2d 148 (Okla. 1957). Moreover, in this case, the court's determination of its jurisdiction in the underlying action is *res judicata*. *See U.S. ex rel. Robinson Rancheria v. Borneo, Inc.*, 971 F.2d 244, 250-51 (9th Cir. 1992), *citing Durfee v. Duke*, 375 U.S. 106, 111-12, 84 S. Ct. 242, 245, 11 L. Ed. 2d 186 (1963) (in an action to enforce a judgment, the underlying court's determination of its jurisdiction over the matter is *res judicata* where a party appeared, contested jurisdiction and lost).

CONCLUSION

In view of the foregoing, further review of this action is unwarranted, and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

AIRCRAFT EQUIPMENT COMPANY, Appellee, vs. THE KIOWA TRIBE OF OKLAHOMA, et al., Appellants.	)	No. 86.184 (CJ-94-2522) (Filed Jan. 5, 1996)

BRIEF IN CHIEF OF THE KIOWA TRIBE OF OKLAHOMA

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January 5, 1996

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

AIRCRAFT EQUIPMENT COMPANY, Appellee,	)	No. 86,184 (CJ-94-2522)
v.	)	
THE KIOWA TRIBE OF OKLAHOMA, et al., Appellant.	)	

BRIEF IN CHIEF OF THE KIOWA TRIBE OF OKLAHOMA

Appellant, The Kiowa Tribe of Oklahoma ("Kiowa"), submits the following brief in support of its appeal from a state court judgment which entered a creditor's bill against Kiowa and enjoined Kiowa from enforcing its tribal laws.

ABSTRACT OF THE RECORD

This appeal challenges Oklahoma's authority over a suit to seize the tax revenues of a federally recognized Indian tribe and to restrain the tribe from enforcing its tribal taxation laws.

The facts involved in this appeal are undisputed. Kiowa is a federally recognized Indian tribe. In a separate case, the District Court of Oklahoma County entered a damage judgment against Kiowa and in favor of Aircraft

Equipment Company ("Aircraft"). (R. 125-31)[1] That judgment arose from Kiowa's default upon an assumption of a promissory note. Assumption of the promissory note was consideration for the purchase of shares in an Oklahoma corporation. In the assumption agreement, Kiowa specifically reserved its sovereign rights. Kiowa did not waive its sovereign immunity or consent to suit in Oklahoma courts. (R. 244)

The damage judgment, and orders which enforced the judgment by garnishing Kiowa's tax revenues, are on appeal in this Court, *Aircraft Equipment Company v. The Kiowa Tribe of Oklahoma*, No. 82,505, and *Aircraft Equipment Company v. The Kiowa Tribe of Oklahoma*, No. 85,272.

This appeal arises from Aircraft's separate suit to obtain, as a post-judgment remedy, a creditor's bill. Aircraft sought a creditor's bill to order oil and gas producers, which remove oil and gas from Kiowa land and are subject to Kiowa's oil and gas severance tax, to pay the Kiowa severance tax to Aircraft rather than to Kiowa. (R.1)

The defendant oil companies filed pleadings which, essentially, interplead the severance tax revenues. (R. 158, 212, 236, 310, 313-14, 343, 409-21) The defendant oil companies also sought orders enjoining Kiowa from enforcing its tribal tax laws. (R. 160, 213, 236, 409-21) Kiowa's tribal tax laws provide a lien and lien foreclosure mechanism

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[1] Citations to "R." refer to the Record, previously bound in Record No. 85,975, as stated in the Court clerk's Index in this appeal.

where severance taxes are not paid upon leases subject to the tribal tax. (R. 258)

Kiowa asserted that the District Court of Oklahoma County had no authority over it because, as a federally recognized Indian tribe, it has sovereign immunity from a damage action and sovereign immunity from an action to enforce a damage judgment. (R. 240-80) Kiowa also asserted that if the District Court of Oklahoma County had any authority over it, then the use of that authority to seize its tax revenues and enjoin it from enforcing its tax law was an impermissible infringement upon its federally protected sovereign rights. (R. 240-80)

The District Court of Oklahoma County concluded that if it had jurisdiction to enter a damage judgment, then there must be jurisdiction to enforce that judgment. (R.III,[2] 156 at pp. 19-20) Hence, the district court granted creditor's bill with respect to Kiowa's tax revenues. (R.III, 129-30) Recognizing, however, that the underlying judgment was on appeal and its jurisdiction was questionable, the District Court ordered the Oklahoma County Court Clerk to hold the tax revenues pending outcome of the appeal of the underlying judgment. (R.III, 156 pp. 19-22) The district court also recognized that Kiowa would attempt to foreclose its tribal law tax lien on the oil companies' mineral leasehold interests and thus the court enjoined Kiowa from enforcing that lien, pending outcome of the appeal. (R.III, 129-30, 156 at pp. 19-20) Hence, Kiowa's tax revenues are currently being paid to the

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[2] Citations to "R. III" refer to those documents indexed within this Record and referred to in this manner in the Court Clerk's Index.

Oklahoma County Court Clerk and Kiowa is enjoined from enforcing its tribal tax laws.

ARGUMENTS AND AUTHORITIES

I.

OKLAHOMA HAS NO JUDICIAL POWER OVER DAMAGE SUITS OR A SUIT TO ENFORCE DAMAGE JUDGMENTS AGAINST FEDERALLY RECOGNIZED INDIAN TRIBES

In order to define Oklahoma's judicial authority over damage suits and the enforcement of damage judgments against a federally recognized Indian tribe, one must define the boundary between two sovereigns – the state and the tribe – with reference to standards set by a third sovereign – the federal government. Each of these areas is addressed below.

1. OKLAHOMA LAW RELATIVE TO "INDIAN INTERESTS" AND TRIBAL IMMUNITY

Oklahoma defined its jurisdiction with respect to "Indian interests" in *Lewis v. Sac and Fox Tribe*, 896 P.2d 503 (Okla. 1994), *cert. denied*, 116 S.Ct. 476 (1995).[3] *Lewis* involved a claim for specific performance by Sac and Fox Housing Authority of an agreement to convey real property and for an accounting for mineral revenues. As an

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[3] This discussion omits reference to *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985). This Court does not appear to have relied upon *Seneca-Cayuga* after the decision in *Seneca-Cayuga Tribe v. Thompson*, 874 F.2d 709 (10th Cir. 1989).

accounting is retrospective in nature and relates to revenues received, presumably, a money judgment was involved. *Lewis* defined Oklahoma's jurisdiction over "Indian interests" as all matters except: (1) those explicitly withdrawn by Congress and (2) those that infringe upon tribal self-government. *Lewis,* 896 P.2d at 508.[4]

It is significant that *Lewis* spoke of "Indian interests" as opposed to dealing directly with the sovereign immunity of a Indian tribe.

Oklahoma addressed the issue of tribal immunity in *Hoover v. Kiowa Tribe of Oklahoma,* No. 78,185, Oklahoma Supreme Court (December 12, 1995). In *Hoover,* Oklahoma drew upon *Lewis* to confirm that it had inherent power over "Indian interests" and then concluded that sovereign immunity was no bar to its judicial power over a damage suit against a tribe, when the tribe was engaged in commercial activity off Indian country.

2. FEDERAL LAW RELATIVE TO STATE AUTHORITY OVER INDIAN TRIBES

The federal law concerning jurisdiction over a federally recognized Indian tribe is considerably more complex, and a state's inherent power is considerably less than suggested by *Lewis* and *Hoover.* Federal law begins with the recognition of tribal sovereignty and involves

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[4] Justice Summers, dissenting, suggests that the issue of state court cognizance is determined by reference to whether the real property in question was "Indian country." In the absence of evidence that it was "Indian country," the dissent found state court jurisdiction. *Lewis,* 896 P.2d at 517, 522.

the result of the Indian Commerce Clause[5] assigning to the federal government the control of commerce with Indian tribes.

Federal law recognizes that the *inherent sovereignty* of Indian tribes is *intact*, except to the extent that it has been withdrawn by federal statute or treaty. *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987).

Because tribal sovereignty is presumed intact, it includes an extensive array of rights, which then are limited and defined based only upon federal actions. The jurisprudence that has sprung from the analysis of tribal sovereignty is so extensive that a generalized description of the nature of tribal sovereignty is impossible. Nonetheless, as *Lewis* recognizes, many cases arising from conflicts between tribal immunity and state power (generally over taxation and regulation), proceed by analyzing federal pre-emption[6] and infringement upon tribal self-government, *see Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989), and often emphasize the location and nature of the disputed activities. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973) (tribally owned ski lift off Indian country subject to state gross receipts tax, but not

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[5] United States Constitution, Article I, Sec. 8, Cl. 3; *Oneida County, N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985).

[6] *In Re Green*, 980 F.2d 595 (9th Cir. 1992) recognizes that "(a)lmost by definition, application of the pre-emption analysis is limited to situations where the state itself is seeking to tax or regulate conduct on the reservation." *Id.* at 595.

subject to state use tax). The preemption/infringement formula, however, is not an exhaustive definition of tribal sovereignty or state power. It is not exhaustive because it fails to account for the fact that federal law recognizes absolute tribal immunity to damage suits. In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991), Oklahoma sought orders forcing a tribe to collect state cigarette taxes on certain Indian country cigarette sales and asked for a $2.7 million damage judgment for back taxes on cigarettes already sold. While the Supreme Court found that the tribe should collect Oklahoma cigarette taxes on certain sales, it refused to enter a money judgment because tribes are immune from damage judgments. *Citizen Band*, 111 S.Ct. at 912.

3. THE *LEWIS* DESCRIPTION OF OKLAHOMA JURISDICTION IS EITHER OVERLY BROAD OR INCONSISTENT WITH FEDERAL LAW; *HOOVER* IS INCONSISTENT WITH FEDERAL LAW

Lewis is either overly broad or inconsistent with federal law. This is so, because federal law recognizes that the inherent sovereignty of Indian tribes is intact, except to the extent that it has been withdrawn by federal statutes or treaty. *LaPlante*, 107 S.Ct. at 975. In short, federal law *assumes tribal sovereignty*, absent some retraction of that sovereignty by federal action. *Lewis*, on the other hand, takes the reverse position and assumes state jurisdiction over "Indian interests" absent an explicit federal ouster or an infringement upon tribal self-government. These two standards are directly opposite to one another.

Lewis describes state jurisdiction much more extensively than federal authority permits.[7]

Lewis reached its conclusion based upon two novel premises: (1) tribal immunity has been "abandoned"[8] and (2) with immunity "abandoned," inherent state court jurisdiction over Indian interests is defined solely by considerations which relate to the division of judicial power between the state and federal governments.[9]

The first *Lewis* premise – tribal immunity has been "abandoned" – is novel because federal law specifies that tribal immunity is lost only by: (1) a clear and unequivocal waiver by the tribe or (2) Congressional action. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670, 56 L.Ed.2d 106 (1978). *Lewis* does not involve a tribal waiver or a Congressional act. *Lewis* has neither of the federally prescribed requirements to avoid immunity. Instead,

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[7] The *Lewis* dissent that would key determination of jurisdiction based upon the geographical location of the property is also too broad. A federally recognized Indian tribe, wherever it may be, is still a federally recognized Indian tribe and the state is still subject to the federal laws which define the nature of that Indian tribe. An Indian tribe's federally protected sovereign immunity to damage suit has an extra-territorial component. *Sac and Fox Nation v. Hanson*, 47 F.3rd 1061 (10th Cir.1995). To allow state law to strip tribal immunity to damages suit based upon geography is to allow state law to override supreme federal law.

[8] *Lewis*, 896 P.2d at 506, 511, n. 59.

[9] *Lewis'* linchpin authority, *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 110 S.Ct. 1566, 108 L.Ed.2d 834 (1990), involves only the concepts of federal versus state authority. It does *not* address interaction with a third sovereign – an Indian tribe.

Lewis avoided immunity by using its own theory of abandonment.[10]

The second *Lewis* premise – inherent state court jurisdiction over Indian interests is defined solely by considerations used in dividing jurisdiction between state and federal governments – is equally novel. This is so because a court's authority over a sovereign is determined from the extent of the *consent of the sovereign itself* to be sued. *United States v. Testan,* 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976); *State of Minnesota v. United States,* 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235 (1939) (United States consent to suit in federal courts in condemnation of Indian land does not create jurisdiction in state courts).[11] *Lewis* is devoid of reliance upon any consent, tribal or Congressional, to create the state court's jurisdiction.

Hoover recognized *Lewis'* failure to address tribal sovereign immunity and acknowledged *Lewis*'s reliance upon the state's inherent authority. *Hoover,* slip opinion, p. 4. *Hoover* relied on *Padilla v. Pueblo of Acoma,* 107 N.M. 174,

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[10] *Lewis* also suggests that any abandonment may have been somewhat less than clear and unequivocal as required by *Santa Clara,* and in fact may have been an implied abandonment. Federal law provides that a waiver *cannot* be implied. *United States v. Testan,* 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). See *Lewis,* 896 P.2d at 511, n. 59.

[11] This analysis proceeds upon the approach of a sovereign being sued in its own courts as opposed to a sovereign declaring its inherent power over another sovereign. This is the proper approach because a state has no authority to declare its inherent jurisdiction over an Indian tribe. Tribal sovereignty is defined by federal law, not by state declaration. *LaPlante,* 107 S.Ct. at 976.

754 P.2d 845 (1988), *cert. denied*, 490 U.S. 1029 (1989), for the idea that a lack of federal law prohibiting one state from exercising jurisdiction over another state, mixed with New Mexico's policy of allowing itself to be sued, was a passable substitute for tribal consent to be sued. Hence, *Padilla* concluded that a state court had jurisdiction over a damage suit against a sovereign tribe and it was not necessary to obtain consent by the tribe or by Congress. *Padilla*, 754 P.2d at 850.

The New Mexico courts, however, have recognized that *Padilla* is flawed. In *DeFeo v. Ski Apache Resort*, 904 P.2d 1065 (N.M. Ct. App. 1995) *cert. denied*, 903 P.2d 844 (N.M. 1995), the New Mexico Court of Appeals held that *Padilla* conflicts with federal law:

> *Padilla* appears to conflict with the Tenth Circuit's more recent holding in *Sac & Fox Nation*, which clearly stated that the location of the commercial activity was not determinative and held that an Indian tribe was immune from suit in state courts "even if the suit results from commercial activity occurring off the [Indian tribe's] reservation," *Sac & Fox Nation*, 47 F.3d at 1065.

DeFeo, 904 P.2d at 1069. The New Mexico Supreme Court denied certiorari in *DeFeo*. *DeFeo*, 904 P.2d at 1065.

The *DeFeo* court held that federal law bars suits against Indian tribes absent a clear waiver by the tribe or by congressional abrogation. *DeFeo*, 904 P.2d at 1067, *citing Citizen Band*, 111 S.Ct. at 909.

The *DeFeo* court adopted the reasoning of the Tenth Circuit *Sac & Fox* opinion and held that a tribe's sovereign immunity applies to a tribe's commercial activity.

DeFeo, 904 P.2d at 1068. The *DeFeo* court concluded that the district court lacked jurisdiction over the tort claim against the tribe and that the tribe had not waived its sovereign immunity by engaging in commercial activity. *DeFeo*, 904 P.2d at 1069.

The *DeFeo* opinion did not need to address the issue of whether a tribe's immunity extends to off-reservation activity because the alleged tort occurred within the tribe's reservation. The court did, however, hold that in light of recent federal decisions, New Mexico courts should give the *Padilla* reasoning a "fresh look." *DeFeo*, 904 P.2d at 1069.

As recognized in *DeFeo*, *Padilla* is wrong. The fact that federal law does not prohibit states from exercising jurisdiction over each other cannot be expanded to tribal immunity cases for two reasons. First, tribes are not states and second, federal law *does* prohibit damages suits against tribes. As held in *DeFeo*, *Padilla* conflicts with federal law. *Hoover* is premised upon *Padilla* and thus *Hoover* is also wrong. *Hoover* was decided without any reference to *DeFeo* or to the federal decisions that forced the New Mexico court to criticize *Padilla*.

4. STATE COGNIZANCE OVER DAMAGE SUITS OR SUITS TO ENFORCE DAMAGE JUDGMENTS AGAINST AN INDIAN TRIBE

Because jurisdiction over a sovereign must grow from that sovereign's consent, Oklahoma's jurisdiction must be drawn solely from federal law that relates specifically to Indian tribes. Only the federal government may define an Indian tribe's sovereignty. *LaPlante*, 107 S.Ct. at

975-75; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982). Federal Law on the commerce clause or other unrelated areas simply cannot be expanded to imply a consent by a sovereign tribe to suit. *United States v. Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). Neither can such unrelated law be used to find inherent state power where none exists. Federal law clearly and plainly provides that absent federal retraction, *LaPlante*, 107 S.Ct. at 975, or an express waiver by the tribe, *Santa Clara*, 98 S.Ct. at 1677, tribal sovereignty is intact and it includes immunity from damage suits. *Citizen Band*, 111 S.Ct. at 910-912.

In this case, Kiowa did not waive its immunity. It certainly did not consent to a seizure of its tax revenue. Kiowa specifically reserved its sovereign rights. Hence, the state court cannot base its jurisdiction upon a *Santa Clara*-type waiver.

Congress has never abrogated tribal immunity to damage suits. It certainly has never authorized seizure of a tribe's tax revenue. In fact, the United States Supreme Court has specifically recognized, and refused to abandon, tribal immunity to damage suits, even in a case where it entered orders commanding the tribe to collect certain tobacco taxes for Oklahoma. *Citizen Band*, 111 S.Ct. at 912. Hence, the court cannot draw its jurisdiction from any federal abrogation.

Simply recognizing there is no jurisdiction over a damage suit against an Indian tribe, however, is not to say that there is no capacity to exercise cognizance of a suit involving a tribe. As *Lewis* recognizes, the nation

does have a dual court system. The United States "Constitution, and laws passed pursuant to it, are as much laws in the states as laws passed by the state legislature." *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990). Under the Supremacy Clause, the federal laws are "the Supreme Law of the Land" that states have a coordinate responsibility to enforce "according to their regular modes of procedure." *Howelett*, 110 S.Ct. at 2438. Also, the *Larson* doctrine[12] permits some degree of specific relief when the activity of a sovereign goes beyond the sovereign's real authority. This has been termed "especially appropriate in Indian law cases." *Tenneco Oil v. Sac & Fox Tribe of Indians of Oklahoma*, 725 F.2d 572 (10th Cir. 1984). Oklahoma is not without cognizance, but it does not have the cognizance it assumes to itself.

Oklahoma must recognize that the federal government grants the state authority over Indian tribes through its regulation of the sovereignty of tribes and its exercise of federal authority under the Indian Commerce Clause. The state's authority is created by what it is given by the federal government. The state's authority is not an inherent authority, limited only by what the federal government takes from the state by way of "ouster." The state cannot rely upon comity to supply a missing consent to jurisdiction. Federal law recognizes significant aspects of tribal sovereignty, including an immunity from damage suits. The state must recognize that immunity is a matter of supreme federal law. This recognition must leave the

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[12] *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949).

state without authority to enforce a damage judgment by seizing tribal tax revenues.

II.

THE TAXING LAWS AND TAX REVENUE OF A FEDERALLY RECOGNIZED INDIAN TRIBE ARE NOT SUBJECT TO STATE COURT JURISDICTION; COMITY REQUIRES OKLAHOMA TO PROTECT KIOWA'S TAX REVENUES

Even if this Court concludes that it does, indeed, have jurisdiction over a damage suit or a suit to enforce a judgment against a federally recognized Indian tribe, then, it may not enforce a judgment by seizing tribal tax revenues and enjoining enforcement of tribal tax laws. To do so violates the *Lewis* restriction against infringing upon tribal self-government.

"[T]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982). The power to tax is, essentially, meaningless, and certainly not useful in self-government, if the fruits of that power are seized by the state and if the state enjoins enforcement of the tax laws. Seizing tax revenue and enjoining enforcement of tribal tax law is an obvious infringements upon tribal self-government which cannot be allowed.

If Oklahoma is allowed to pursue the approach to Indian sovereignty followed by *Padilla* (but rejected by *DeFeo*), then it must also recognize that Oklahoma would not allow an Oklahoma court to seize Oklahoma's tax

revenues. Under *Padilla*, comity principles would require that Oklahoma not seize another sovereign's tax revenues.

CONCLUSION

Oklahoma has no judicial power over a damage suit against a federally recognized Indian tribe. Likewise, it has no judicial power to enforce a damage judgment against a federally recognized Indian tribe. Oklahoma's power over suits and enforcement of judgments against tribes arises from the consent of the tribe or from a grant from the federal government. In this case, the tribe did not consent, but, reserved its sovereign rights. The federal government has never authorized damage suits or suits to enforce damage judgments against a tribe, but, has clearly recognized tribal immunity from damages suits.

The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government. Seizing the fruits of this power must be an infringement upon a tribe's federally protected right to self-government.

The judgment and orders of the district court must be reversed and vacated and the court ordered to dismiss the case. The Oklahoma County Court Clerk should be ordered to pay Kiowa's tax revenues to Kiowa.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January, 1996, a true and correct copy of the above and foregoing document was placed in the United States Mail, postage prepaid and addressed to:

I further certify that a copy of the above and foregoing Brief in Chief was filed in the Office of the County Clerk of Oklahoma County on the 5th day of January, 1996.

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IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

AIRCRAFT EQUIPMENT COMPANY, a partnership, Appellant, versus THE KIOWA TRIBE OF OKLAHOMA, AQUILLA ENERGY CORPORATION, THE HOMESTAKE ROYALTY CORPORATION, KERR-McGEE REFINING CORPORATION, ORYX ENERGY CORPORATION, PLAINS LIQUIDS TRANSPORT, INC., SUN COMPANY, INC. (R & M), ASSOCIATED NATURAL GAS, INC., ASSOCIATED TRANSPORT AND TRADING COMPANY, SENEX PIPE LINE COMPANY, AND HAMON OPERATING COMPANY, Appellees.	)	No. 85975 (Filed Sep. 22 1995)

ANSWER BRIEF OF THE
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IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

AIRCRAFT EQUIPMENT COMPANY, a partnership,	)	
Appellant,	)	No. 85975
versus	)	
THE KIOWA TRIBE OF OKLAHOMA, AQUILLA ENERGY CORPORATION, THE HOMESTAKE ROYALTY CORPORATION, KERR-McGEE REFINING CORPORATION, ORYX ENERGY CORPORATION, PLAINS LIQUIDS TRANSPORT, INC., SUN COMPANY, INC. (R & M), ASSOCIATED NATURAL GAS, INC., ASSOCIATED TRANSPORT AND TRADING COMPANY, SENEX PIPE LINE COMPANY, AND HAMON OPERATING COMPANY,	)	
Appellees.	)	

ANSWER BRIEF OF THE KIOWA TRIBE OF OKLAHOMA

INTRODUCTION

This appeal is part of an extensive group of legal proceedings that are currently pending at various stages of trial or appeal. All the proceedings center upon the question of whether a federally recognized Indian tribe, which has not waived its sovereign immunity, may be sued for damages in Oklahoma courts, and, if so, may Oklahoma courts then seize tribal tax revenues in satisfaction of a damage judgment against the tribe.

The Kiowa Tribe of Oklahoma (Kiowa) has consistently asserted that a key aspect of its federally recognized sovereignty is that it is immune from damage suits and its property, especially its tax revenues, cannot be seized.

The issues raised in this appeal center upon various orders entered at a May 26, 1995, motion docket. Most of those orders were preliminary, non-dispositive and appear to have been supplanted by a judgment entered on August 14, 1995, after a trial on the merits of this particular case.

The underlying case in this group of related matters is *Aircraft Equipment v. The Kiowa Tribe of Oklahoma*, No. CJ-92-10176, District Court of Oklahoma County. In that case, Aircraft Equipment Company ("Aircraft") recovered a money judgment upon a guaranty executed by Kiowa.

That case was appealed by Kiowa in *Aircraft Equipment Company v. The Kiowa Tribe of Oklahoma*, No. 82,505, Supreme Court of Oklahoma. The Court of Appeals

affirmed the money judgment. The Supreme Court of Oklahoma granted certiorari. The case awaits decision.

While the appeal was pending, Aircraft garnished the severance tax revenue of Kiowa.[1] The garnishment generated a second appeal, *Aircraft Equipment Company v. The Kiowa Tribe of Oklahoma and Watson Management Group, Inc.*, Garnishee, No. 85,272, Supreme Court of Oklahoma.[2]

Apparently wishing to avoid successive garnishments, or perhaps wishing to avoid jurisdictional issues being posed by Kiowa, Aircraft sued for a creditors' bill in the case *Aircraft Equipment Company v. the Kiowa Tribe of Oklahoma* et al, No. CJ-94-2522, District Court of Oklahoma County, Oklahoma. (This appeal is from rulings in the creditor's bill case.) That suit sought an order to direct various named oil companies to pay Kiowa's severance tax not to Kiowa, but, directly to Aircraft in satisfaction of its judgment.

This appeal arises from certain preliminary and non-dispositive orders entered in May, prior to any hearing of the merits of the suit for a creditors' bill.

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[1] Kiowa, in exercise of its federally recognized sovereign authority, has imposed a severance tax upon production of oil and gas from lands subject to its jurisdiction. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L. Ed. 2d 21 (1982): The tribal law which creates the severance tax also provides for a lien and foreclosure as a remedy for failure to pay the tax.

[2] Kiowa also applied for a writ of prohibition in the garnishment proceedings, *The Kiowa Indian Tribe of Oklahoma v. The Honorable Carolyn R. Ricks*, No. 84,729, Supreme Court of Oklahoma. The Supreme Court refused original jurisdiction.

The creditors' bill suit was heard on the merits on August 14, 1995. The judgment and decree entered on the merits has generated yet another appeal, *Aircraft Equipment Company v. The Kiowa Tribe of Oklahoma et al.*, No. 86,184, Supreme Court of Oklahoma, in which Kiowa has challenged rulings of the District Court of Oklahoma County which (1) order its tax revenues paid to the Oklahoma County Court Clerk (2) restrain Kiowa from enforcing its laws creating liens to enforce payment of the tax.

The common thread of Kiowa's position in all of these proceedings is that, as a federally recognized Indian tribe, it is sovereign and, by federal law, immune from damage suits. As a result, Oklahoma courts have no jurisdiction to hear damage suits against it. Further, the seizure of its tax revenues is an impermissible infringement upon its federally recognized and federally protected sovereignty.

FACTS

Most of Aircraft's points of error in this case arise from orders entered at a May 26, 1995, motion docket. There were no witnesses called, nor evidence taken at the motion docket – only arguments of counsel.

At that May 26, 1995 motion docket, the trial court was faced with a situation in which:

1. Aircraft moved for summary judgment upon its suit for a creditors' bill to direct the oil company defendants to pay Kiowa's severance tax directly to Aircraft.

2. Kiowa moved for dismissal of Aircraft's petition for a creditors' bill, and raised jurisdictional issues arising from its sovereign and immune status as a federally recognized Indian tribe.

3. The oil company defendants found themselves, on the one hand, subject to a possible court order directing them to pay Kiowa's tax revenues to Aircraft, and, on the other hand, facing Kiowa's assertion that such an order was jurisdictionally void, and Kiowa would foreclose its tax liens upon the oil companies' oil and gas leases. Understandably, the oil companies interplead the tax revenues and asked to be relieved from further proceedings.

At the May 26, 1995, motion docket, the trial court determined that most dispositive issues were on appeal in the above described appeals.

With pragmatism, if not evidence, the trial court denied the motions of Aircraft and Kiowa, ordered the oil companies to make all payments of Kiowa's severance taxes to the court clerk of Oklahoma County, restrained Kiowa from foreclosing its tribal law lien against the oil company leases, and restrained Aircraft from further garnishment against the oil companies. The matter was set for trial.

The essence of this appeal is Aircraft's attempt to escape from the trial court's orders entered on May 26, 1995.

As the creditors' bill case has now been tried on the merits, and a judgment has now supplanted most, if not

all, of the May 26, 1995, orders, this appeal is largely moot.

KIOWA'S ANSWER TO PROPOSITION I: INJUNCTION AGAINST AIRCRAFT

Proposition I appears to complain of the issuance of injunctive relief against Aircraft at the May 26, 1995, motion docket.

As no relief is sought against Kiowa, Kiowa makes no response to Proposition I. Kiowa does observe, though, that the May 26, 1995, orders were supplanted by the judgment entered on August 14, 1995.

KIOWA'S ANSWER TO PROPOSITION II: INTERPLEADER

Defendant oil companies responded to conflicting claims upon the severance tax funds they hold by requesting relief in the nature of interpleader. The relief required including being dismissed upon paying funds into court.

Again, as no relief is sought against Kiowa, Kiowa makes no response to Proposition II. Kiowa does observe, however, that the oil companies are not, at least in this case, "garnishees."

KIOWA'S ANSWER TO PROPOSITION III: ATTORNEY FEES

In interpleader, the award of attorney fees is in the discretion of the trial court under 12 O.S. § 2022.

Kiowa responds, however, that no cause of action, interpleader or otherwise, is proper to seize its tax revenue. As the court has no power to seize tax revenues, it also has no power to award attorney fees from such funds.

As a federally recognized Indian tribe, Kiowa is a sovereign, immune from any suit for damages. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 103 S.Ct. 2378, 76 L Ed 2d 611 (1983); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe;* 498 U.S. 505, 111 S. Ct. 905, 112 L Ed 2d 1112 (1991) Admittedly, Indian tribes are sued. Such cases are generally limited to actions of an equitable or declaratory nature where the decrees are sufficiently restricted so as not to infringe upon the tribe's sovereignty. *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 85 S. Ct. 1242, 14 L ed 2d 165 (1965). Notwithstanding the fact that federal law will allow some equitable or declaratory relief against tribes, federal law very plainly will not allow a damage suit. *Citizen Band*, supra. Seizure of tax revenue absolutely denies the sovereign the economic capacity to act as a sovereign. As such this seizure must be an infringement upon a tribe's federally protected right to self-governance.

KIOWA'S ANSWER TO PROPOSITION IV: GARNISHMENT

In essence, Aircraft asserts that notwithstanding its creditors' bill suit, it should be allowed to continue to garnish the defendant oil companies.

The May 26, 1995, order enjoining Aircraft's garnishment is now replaced with a judgment and thus this proposition appears to be moot.

CONCLUSION

This appeal is largely moot. The orders entered at the May 26, 1995, motion docket – largely preliminary and non-dispositive – have been replaced by a judgment entered upon trial on the merits. Beyond that, the Kiowa Tribe of Oklahoma, by federal law, is immune from this action. That complaint, however, is being pursued in other pending appeals.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22 day of September, 1995, a true and correct copy of the above and foregoing document was placed in the United States Mail, postage prepaid and addressed to:

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